ANTITRUST IN JAPAN: THE ORIGINAL INTENT

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Abstract: This Article examines the "original intent" of those involved in drafting Japan's Antimonopoly Act, passed in 1947. Japanese sources generally assume this legislation to be pure American invention, a foreign transplant that the Japanese did not understand and that was improperly imposed on a country in which antitrust was, and continues to be, irrelevant. Drawing on original Occupation documents, however, this Article shows that negotiators from Japan's government understood perfectly well what the legislation was about. More than understanding, the government of Japan in fact drafted the statute that was finally enacted, and its provisions reflect the success Japan's negotiators had in achieving many of their goals. Significantly, a major goal on the Japan side (and one quite consistent with traditional antitrust concerns) was to prohibit exclusionary practices that restricted market access and to "democratize" markets so that entrepreneurs would be provided with a fair opportunity to compete. This Article sets the statute in its economic context in Japan and traces the drafting process through the numerous revisions of the Act. This Article also suggests that the story of this process and its outcome holds some lessons for those now interested in drafting some type of international antitrust agreement. In particular, the story of the adoption of Japan's antitrust statute demonstrates that the critical difference among antitrust regimes lies less in the substantive law provisions of the statutes than in the institutions of antitrust enforcement that are adopted. Thus, the substantive provisions of an international antitrust code or agreement are likely to prove less critical than any institutions which will carry out such a code or agreement.

I. INTRODUCTION

The question of the original intent of those responsible for drafting and enacting laws, be they statutory or constitutional, has consistently attracted the attention of courts and scholars. For U.S. antitrust law, the question of original intent was first comprehensively addressed in 1954 by Hans Thorelli and then in 1965 by William Letwin.† One might have thought the subject fully plumbed until the publication of a revisionist argument by Robert Bork in 1978. According to Bork, the original intent of the framers of the Sherman Act was only to achieve allocative efficiency and

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advance consumer welfare, narrowly defined. Bork’s writing then set off a round of rebuttals.

There has been no comparable exploration of the original intent of Japan’s Antimonopoly Act, which was passed in 1947. Japanese-language sources devote only slight attention to the origins of the Act. The most thorough English-language exploration of the enactment of Japan’s antitrust law, by Eleanor Hadley, devotes much of its effort to describing and understanding the structure of Japan’s post-War economy, the position of the major Japanese firms (the “zaibatsu”) in that economy, and the efforts undertaken by the Occupation forces to restructure those firms. As a general matter, little study has been done on the question of how Japan’s antitrust statute came to contain the provisions that it did, or the nature of the goals that its drafters sought to advance.

One reason for the lack of such a study may have been the difficulty of obtaining access to the relevant documents. In 1982, however, Japan’s National Diet Library photocopied more than thirty million Occupation documents from the United States National Archives and Records Service. Within this collection are original drafts of Japan’s antitrust legislation and connected memoranda. These documents provide a much fuller picture of the background of this legislation than has heretofore emerged.

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5 See, e.g., CHIKAI IMAMURA, KEIZAI HÔ [ECONOMIC LAW] 12 (1985); JAPAN FAIR TRADE COMMISSION, DOKUSEN KINSHI NIJUNENSHI [TWENTY YEAR HISTORY OF ANTIMONOPOLY POLICY] 42 (1968). For the fiftieth anniversary of the passage of the Antimonopoly Act, however, the Fair Trade Commission reviewed accounts of the Act’s history, including a draft version of this Article.
6 See ELEANOR M. HADLEY, ANTITRUST IN JAPAN (1970). For Hadley’s discussion of the adoption of the Act, see id. at 120-24. Hadley gives short treatment to the legislation even though she participated in some of the negotiations over its content. A more recent discussion of the background of the Act similarly does not explore in great depth the questions surrounding the drafting of the Act. See Alex Y. Seita & Jiro Tamura, The Historical Background of Japan’s Antimonopoly Laws, 1994 U. ILL. L. REV. 115, 168-69 & n.345. For other English-language expositions, see, e.g., MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 2-3 (with John D. Davis 1990); HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS OF JAPAN 16-19 (1994).
Why is original intent important? When Robert Bork wrote his study of the Sherman Act, he was not so much interested in the drafters' intentions regarding the specific language of the Act. Rather, he was more concerned with understanding the Sherman Act's general drift, its overall pattern. Given the basic premise of the primacy of legislative expressions in a democracy, subsequent interpretations of a statute are supposed to be kept within this general pattern. Through an examination of the setting within which the legislation grew, along with the relatively contemporaneous applications of the legislation, we make an effort to recapture the meaning of the concepts embodied in legislation. In most cases, the meaning of such concepts changes over time, perhaps further than it should.

Those drawn to writing about original intent have often been motivated by their own sense of what the proper "drift" of the statute should be, and reference to the framers is meant to buttress their normative arguments. Bork, of course, was arguing for the Chicago School view that allocative efficiency is all there is to antitrust, and that (other) political values are irrelevant. His critics took him on to show the opposite.

This study of the original intent of Japan's antitrust statute is also motivated by a desire to set the drift straight. The conventional view of the legislative history of Japan's antitrust law is that it was pure American invention, a foreign transplant that the Japanese did not understand and that was improperly imposed on a country in which antitrust was, and continues to be, irrelevant and perhaps even harmful. This "sense" of the statute not only has affected Japan's interest in antitrust enforcement, but, from time to time, affects our own debates over the wisdom of antitrust in the United States.

The record of the adoption of Japan's antitrust law shows, however, a more complicated picture. The legislation emerged only after a complex negotiating process with Japan's government. It is quite apparent that during this process Japan's negotiators understood perfectly well what the legislation was all about. More than understanding, the government of Japan drafted the statute that was finally enacted, and Japan's negotiators were able to achieve many of the goals they sought in terms of its content. This content complemented at least some of the economic policies that Japan sought to follow in the post-War period.

The conventional view of antitrust in Japan has also stressed the connection between antitrust and deconcentration, which was primarily achieved through the restructuring of the zaibatsu. A closer review of the original intent of the legislation, however, reveals a somewhat different, though related, goal. A major objective of Japan's antitrust statute, shared
by drafters on both sides, was to increase market access. Structural prohibitions were quite important, of course, for achieving this goal. The real focus of the legislation, however, was on exclusionary conduct, whether that conduct was done by cartels or by the zaibatsu. The economic concern was not so much price-raising behavior as strategic practices; the political objective was to democratize the markets and provide all with the opportunity to compete. Awareness of the primacy of the market access goal and the concern for exclusionary practices is an important aid for interpreting the statute. It also reminds us that the goals of antitrust in general need not be as narrowly confined as some would have.

Study of the original intent of Japan’s antitrust law offers a further insight into antitrust systems in general. Antitrust in the United States was conceived and implemented in a framework of legalistic regulation, the purpose of which was to protect those who were the victims of improper business conduct. Antitrust in Japan was placed in a very different regulatory culture, one which viewed antitrust (and economic law) as a tool of government that bureaucrats might use to guide and manage the economy. These differences in regulatory culture are difficult to see when only one’s own system is examined; the differences become more apparent when reflected in the mirror of comparative perspective. These differences, however, had an important effect on the shape of the final legislation and they eventually had a substantial effect on the strength of antitrust enforcement in Japan. They also remind us that the process of law transplantation must account for the intersection of legal provisions and legal institutions.

Fifty years after Japan enacted its antitrust law, scholars and policymakers are considering the wisdom of some type of international antitrust agreement. The story of the drafting of antitrust legislation in Japan suggests a certain universality to the problems that antitrust law addresses. These problems are not Japanese problems; they are economic and political problems. Attention to market access, exclusionary practices, and the institutions of antitrust enforcement may be as important on an international level today as they were in Japan fifty years ago.

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II. SETTING THE STAGE: BUSINESS CULTURE, REGULATORY CULTURE, AND THE CHARACTERISTICS OF JAPAN’S ECONOMY

When the new [Meiji] government decreed in the summer of 1871 that samurai cut off their topknots, Matsumoto Jutaro realized that there would be a lot of cold heads that winter and a corresponding demand for wool caps and scarfs. So he took a ship bound for Nagasaki, then the center of Western trade, to try to corner the market on woolen headgear. To his surprise, he found a dozen or more merchants on board with the same idea in mind. To avoid competition that would drive up prices, he got the others to cooperate with him in buying up the supply of woolen headgear surreptitiously at normal prices and then dividing the stock acquired evenly among them. The scheme worked, and Jutaro sold his entire stock at a handsome profit to clamoring customers. One glimpses in this incident the budding commercial skills [that]... would one day astound the world.8

A. Introduction

Understanding the purposes of the drafters of Japan’s antitrust law requires some appreciation of the setting in which this law was adopted, particularly the characteristics of the economy and industrial structure of pre-War Japan. Understanding how antitrust law might work in Japan also requires some appreciation of the culture that produced this structure and in which antitrust law would operate.

Taking “culture” in the sense of an overall pattern of behavior and values within which people and institutions operate, two cultures are of particular relevance, the business culture and the regulatory culture. Business culture can be conceptualized on a continuum, with the poles marked as “rivalrous” and “cooperative.”

PACIFIC RIM LAW & POLICY JOURNAL

Figure 1. Business Culture

![Business Culture Continuum](https://via.placeholder.com/150)

Rivalrous Cooperative

Regulatory culture can be conceptualized as a continuum running from legalistic to bureaucratic.

Figure 2. Regulatory Culture

![Regulatory Culture Continuum](https://via.placeholder.com/150)

Legalistic Bureaucratic

A legalistic regulatory culture is one focused on protecting the law’s beneficiaries from identified harmful acts. Its core concern is preventing victimization and it works by prohibitory rules. Such regulation is fact-bound, backward-looking, and oriented toward individual cases. The decisionmaking model is a trial, with its requirements that evidence be presented and a judgment be justified.

A bureaucratic regulatory culture is focused on how the economy should be structured and run. Its core concern is economic welfare and it works by guidance. This type of regulation is group-oriented, theory-based, and forward-looking. The decisionmaking model is consensual, and rigorous justification for particular decisions is not only unnecessary but may be unwise.

A review of the development of Japan’s economy indicates that the business culture in Japan was not much different from what one might expect in the West. That is, firms would operate toward the rivalrous pole if they had to, but would cooperate if cooperation were economically beneficial. On the other hand, Japan’s regulatory culture was closer to the bureaucratic end of the spectrum. This development can be traced back at least to the time when Japan was forced to open itself to the West and embarked on a period of industrialization.

B. The Developing Economy

Price-fixing, and a governmental response to collusive behavior, is apparently an old story in Japan. In 1622, Ieyasu Tokugawa, who had only
recently consolidated his control of the whole of Japan and taken the title of "Shogun," promulgated the following law:

Re Trade in General: Commercial transactions must be free, and no one shall act to the contrary or combine to manipulate prices. It is strictly forbidden for any person to contract with his fellow traders for such purposes, and hereafter any person found violating the law must be reported to the authorities.\(^9\)

This enactment was promulgated one year before the British Parliament enacted the Statute of Monopolies, the historical antecedent for U.S. antitrust legislation.\(^10\) It came in response to the activities of the *tonya*, firms that performed a wholesaler/middleman role and were thought to be taking advantage of the ignorance of the Edo (Tokyo) population by manipulating prices.\(^11\) The legislation, however, was not completely successful, and *tonya* and other merchants during the Tokugawa period continued to develop "ingenious means for collusive actions to prevent competition," including price-fixing.\(^12\) The *tonya* themselves evolved from the role of joint sales agents for producers into a form of trade association that was able to regulate the terms of trade in some industries. Some of these *tonya* have been described as having the "nature of a trust."\(^13\) Patterns for collective action, both in organizing the *tonya* and in organizing groups of *tonya* representing various industries, developed in part out of a desire to regulate output and raise prices.\(^14\)

Japan was virtually closed to the outside world during much of the period of the Tokugawa Shogunate, a "dream world of almost two hundred years of isolation."\(^15\) Change began in 1860 with the treaty that the United States required Japan to sign, signaling the end of Japan’s isolation and the

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\(^9\) Y. TAKEKOSHI, 2 THE ECONOMIC ASPECTS OF THE HISTORY OF THE CIVILIZATION OF JAPAN 489 (1930). See also KUJIKATA OSA DAMEGAKI (Book I), Section 13(b), Provision 9 (1711) (Dan F. Henderson, unpublished translation). ("Various artisans must not prearrange and cause high prices for their construction costs and wages. Causing high prices for various merchandise, either by buying up and cornering the sales at some place or by prearrangement, is forbidden.")

\(^10\) The Statute of Monopolies, 21 Jac. 1, c. 3 (1623).

\(^11\) See TAKEKOSHI, supra note 9, at 489. For further description of the *tonya* and the efforts to control their price manipulations, see id. at 489-91.

\(^12\) M.Y. YOSHINO, THE JAPANESE MARKETING SYSTEM: ADAPTATIONS AND INNOVATIONS 3 (1971).

\(^13\) TAKEKOSHI, supra note 9, at 495 (Kyushu orange growers).

\(^14\) A good example is provided by the development and organization of growers and distributors of Kyushu oranges in the late 1600s. See id. at 491-96 (number of growers organizations was limited; each organization was assigned a single *tonya* in Edo with which it could deal).

beginning of the process of opening Japan to the West. These events triggered the collapse of the Shogunate and, by 1868, the restoration of the Emperor and the start of the Meiji period.

Japan's treaty with the United States required Japan to set relatively low, fixed import tariffs. By virtue of most-favored-nation clauses, these tariffs were then applied to other countries from which Japan would import. This, in turn, affected Japan's approach to industrialization. In part because these low import tariffs provided ready access for imports, Japan became determined to establish its own manufacturing sector "to drive foreign manufactured goods out of the domestic market by producing competitive locally manufactured goods and [then] to build up export industries."

Economic policy in this critical period was led by government officials rather than by private groups. This was in part a result of the weak position of the merchant class of the Tokugawa period, which did not acquire the political influence exercised by successful merchants in other countries and consequently was not a major force among the groups seeking to open Japan. Industrialization initially proceeded by government enterprise, but in 1880 all governmentally-owned industries were ordered privatized, with the exception of the railroads, telegraph, and arsenals. Although these assets were placed in private hands (at very favorable prices), there remained close collaboration between the government and these major firms, with such firms often being afforded preferential government treatment to advance government economic goals. The government thus took on much of the responsibility for directing the modernization of Japan's economy.

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17 See id. at 512, 534, 578.
19 The weak role played by merchants, in comparison to the samurai class, in the overthrow of the Shogunate is discussed in Hadley, supra note 6, at 32-35. Yoshino argues that the monopoly position enjoyed by established "city merchants" dulled their energy and initiative, thereby explaining their weak role in the Meiji restoration. Yoshino, supra note 12, at 6-7.
20 Kanazawa, supra note 18, at 481-82; William W. Lockwood, Economic Development of Japan: Growth and Structural Change 1868-1938 507-08 (1954); Seita & Tamura, supra note 6, at 132. After 1899, Japan also employed tariffs to protect local industry, although tariff rates were generally not higher than 10-15% until 1910. See Lockwood, supra, at 539-44.
21 It has been argued that the sale of these enterprises at low prices was not made to favor the recipients, but because of the government's financial difficulties. See Reischauer, supra note 8, at 95.
22 See, e.g., Hadley, supra note 6, at 35-38.
C. The Pre-War Economy

The developmental pattern from the Tokugawa period, through the Meiji restoration, and into the twentieth century produced a pre-War economy with certain structural characteristics. These characteristics are important for understanding the setting within which Japan's antitrust law was adopted.

1. Conglomerate Enterprise and Oligopolisitic Market Structure

The most powerful firms in Japan's pre-War economy were the "zaibatsu" (literally, financial combine), of which the major ones were Mitsui, Mitsubishi, Sumitomo, and Yasuda. In 1937, these four firms controlled approximately ten percent of Japan's paid-in capital.\(^{23}\) Mitsui and Mitsubishi alone employed approximately 3.8 million people by 1945. The absolute size of these companies, however, was not a recent phenomenon. Mitsui, for example, which began in the early 1600s with a pawnshop and a sake and soy sauce brewery,\(^{24}\) employed more than one thousand people in its Edo (Tokyo) stores alone by the mid-1700s.\(^{25}\)

Each zaibatsu consisted of numerous firms coordinated through a "main" holding company. The group was reinforced by an extraordinarily complex web of cross-company stock ownership and by the practice of personnel dispatching among zaibatsu members.\(^{26}\) Each zaibatsu produced a wide range of products and engaged in manufacturing, mining, shipping, real estate, energy, agriculture, banking, and insurance, as well as general "trading."\(^{27}\)

Despite the dominance of the zaibatsu, the basic characteristic of Japan's pre-War market structure was oligopoly, not monopoly. "[H]igh single-firm occupancy of market positions was not characteristic."\(^{28}\)

\(^{23}\) Id. at 54 (Table 3-3).

\(^{24}\) See T.A. BISSON, ZAIBATSU DISSOLUTION IN JAPAN 9 (1954) [hereinafter BISSON, ZAIBATSU DISSOLUTION].

\(^{25}\) YOSHINO, supra note 12, at 4.

\(^{26}\) Diagrams of the four companies' holdings were prepared by Occupation authorities in 1946. They are reproduced in BISSON, ZAIBATSU DISSOLUTION (Supp.), supra note 24. For discussion of the complex interlocking directorships within the zaibatsu, see HADLEY, supra note 6, at 82-85.

\(^{27}\) See HADLEY, supra note 6, at 48-55 (Tables 3-1, 3-3).

\(^{28}\) Id. at 325. Hadley's data, id. at 326-27, show only five examples of single-firm concentration ratios in excess of 70% in 1937, a lower level than existed at the time in the United States. See CLAIR WILCOX, TEMPORARY NATIONAL ECONOMIC COMMITTEE, 76TH CONG., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER: COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 69 (1940) (designating at least 10 industries controlled exclusively by a single firm as of 1940).
sense, oligopoly was simply a reflection of the extraordinarily diverse multiproduct makeup of each of the zaibatsu. It also reflected the existence in Japan of many small and medium-sized producers, some of which were "elaborately organized" in terms of specialization and relationships with purchasers.29

2. International Trade

A critical component of Japan’s modern economic policy has been the building of export markets. This policy began when Japan was opened to the West, at a time when Japan did not even have any ocean-going vessels (they had been banned during the Tokugawa period).30 It was a product of the realization that without export markets, Japan would be an economically backward country that could never resist the West militarily or even retain control over its affairs.

Trade was very much tied to the national interest during this period. The Meiji government leaders generally did not see economic policy as a matter to be left to the private sector, and this was particularly so when it involved foreign trade. In 1879, Masayoshi Matsukata, one of the major governmental figures of the period, talked about the silk industry this way:

The outcome of trade is inseparable from the interests of the nation, and it is of greater consequence than the bloodshed and disaster which come from wars... In the war of trade, money should serve as our weapons and supplies, and national production must be our generals and soldiers. If production is low, we must use to our advantage our military supplies, scattering silver and gold and using them to start silk industries and increase production.31

The push for international trade led to two distinctive elements in the structure of Japan’s economy. First, the emphasis in the economy was on

29 G.C. Allen, Japan’s Economic Expansion 11-12 (1965).
30 See G.C. Allen, A Short Economic History of Modern Japan 19 (1962) (The government forbade the building of large ships because of its policy of isolating Japan from the rest of the world.); Shigeru Uyehara, The Industry and Trade of Japan 176 (2d ed. 1936) (ocean-going vessels banned from 1637 to 1857). Id.
31 Reischauer, supra note 8, at 222. Masayoshi Matsukata was appointed Finance Minister in 1881. Id. at 92. By 1885, silk exports had tripled from the 1880 level; from 1876 until the 1930s, these exports financed more than 40% of Japan’s entire imports of the machinery and raw materials with which Japan built its industrial base. See id. at 224-25, 228.
“adding value” to imported raw or semi-finished goods and exporting higher-value manufactured goods. Japan was highly successful at this before World War II. Between 1931 and the start of the Sino-Japanese War in 1937, a time when international trade was generally stagnating, Japan’s exports rose by seventy-five percent. This led to a number of countries attempting to “weaken her competition” by increasing tariffs or imposing quotas on Japanese goods. This, in turn, led Japan’s government to encourage export cartels, the purpose of which was to restrict exports and raise prices.

The second important element in Japan’s approach to international trade was the way Japan’s business firms structured their relationships with foreigners and foreign companies. Although foreign assistance was welcomed, foreigners were not assimilated into Japan’s business structure. Early advisers were paid handsomely, but were encouraged to return home quickly. By 1900, most of these early advisers had left Japan. In the twentieth century, the zaibatsu formed alliances with major foreign corporations and took licenses for the use of their technology in Japan. These companies were not permitted to establish operations in Japan, however, unless they worked in collaboration with a Japanese co-venturer. In this way, Japan was able to participate in international trade while still maintaining control over its home markets and industries.

3. Cartels

As indicated above, cartels (the coordinated efforts of groups of competitors to control price, output, or product characteristics, or to allocate markets) date back at least to the Tokugawa period. The incidence of cartelization during the early period of industrialization, however, may have

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32 For discussion of Japan’s reliance on imports for its supply of raw materials, see ALLEN, supra note 29, at B-9.
33 See id. at 1, 9 (excludes colonial trade). The value of Japan’s exports in 1936 was 22.4% of national income, in comparison to much lower figures for the United States (3.7%), Germany (6.5%), France (13.4%), or the United Kingdom (18.2%). See SPECIAL SURVEY COMMITTEE, MINISTRY OF FOREIGN AFFAIRS, JAPAN, POSTWAR RECONSTRUCTION OF THE JAPANESE ECONOMY, SEPT. 1946 29 (Saburo Okita 1990) [hereinafter SSC REPORT].
34 See ALLEN, supra note 29, at 14 (noting that “[t]hese measures had only moderate success”).
35 See id. at 109.
36 See EDWARD S. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 73 (1957). For different connotations of the word cartel as used in Japan, see HADLEY, supra note 6, at 357-58. See also Ken'ichi Imai, Japan’s Industrial Organization, in INDUSTRY AND BUSINESS IN JAPAN 108 (Kazuo Sato ed., 1980). (“By a cartel, the participating firms exercise concerted action or common policy concerning only the agreed-upon matters, while maintaining their individual sovereignty as independent and equal partners.”)
been fairly low. Eleanor Hadley, in her thorough study of the question, lists only three cartels as having been formed between 1880 and 1920, although the oldest of these, the Japanese Cotton Spinning Federation, did involve Japan’s most significant pre-War export industry.\(^{37}\)

Cartelization in major industries began to increase in the 1920s.\(^{38}\) In 1925, legislation to encourage the formation of cartels was adopted for the first time (for export industries).\(^{39}\) In 1931, the broader Important Industries Control Law was enacted.\(^{40}\) This law permitted industry groups to exercise "self-control." Associations formed under the law could fix levels of production, establish prices, limit new entrants, and control marketing.\(^{41}\) Agreements created pursuant to this law required two-thirds approval by the enterprises in a particular industry, followed by approval by the Ministry of Commerce and Industry, the predecessor of today’s Ministry of International Trade and Industry ("MITI").\(^{42}\) The government had the power to change an agreement and to force nonparticipants to abide by an agreement’s terms.\(^{43}\)

The next major statute encouraging cartelization in Japan was the Major Industries Association Ordinance of 1941. This law was the result of a plan that had emerged in 1940 for a "new economic structure."\(^{44}\) The plan was drafted by the Japan Economic Federation (representing Japan’s heavy industry) and the Japan Chamber of Commerce and Industry, in part under the pressure of the war effort, but also out of a desire to suppress

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\(^{37}\) The three cartels were the Japan Paper Manufacturers Federation, Japan Cotton Spinning Federation, and the Japan Fertilizer Manufacturers Association. Hadley, supra note 6, at 359. For information on the Spinning Federation, see for example, Jerome B. Cohen, Japan’s Postwar Economy 61-64 (1958) [hereinafter Cohen, Japan’s Postwar Economy]. For further description of spinning cartels, see generally J. Mark Ramseyer, Credibly Committing Efficiency Wages: Cotton Spinning Cartels in Imperial Japan, 1993 U. Chi. L. Sch. Roundtable 153. See also Ryo Shin Minami, The Economic Development of Japan: A Quantitative Study 175-93 (2d ed. 1994) (Textiles accounted for 66% of total manufacturing exports in 1920).

\(^{38}\) Hadley lists 27 such cartels formed between 1920 and 1931. A number of these cartels are in different phases of the steel industry. See Hadley, supra note 6, at 359-61.

\(^{39}\) See Kanazawa, supra note 18, at 482.


\(^{41}\) See Chalmers Johnson, MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975 109 (1982); J. Mark Ramseyer & Frances M. Rosenbluth, The Politics of Oligarchy: Institutional Choice in Imperial Japan 147-48 (1995). In most of the industries in which associations were formed, joint sales agencies were also established, eliminating competition in the distribution process. See Iyori & Uesugi, supra note 6, at 3 n.10.

\(^{42}\) Cf. Parker v. Brown, 317 U.S. 341 (1943) (examining procedure for adoption of “proration” system to limit output of raisins; procedure required approval of majority of growers along with participation by government regulators).

\(^{43}\) Twenty-six industries were designated under the legislation, including silk thread, rayon, paper, cement, wheat, flour, iron and steel, coal, petroleum, cotton spinning, electrical machinery, and shipbuilding. See Johnson, supra note 41, at 110.

\(^{44}\) See H.T. Oshima, Japan’s New Economic Structure, 15 Pac. Aff. 261 (1942).
competition. Even before the enactment of this law, however, many industries in Japan had been organized into some form of a cartel or association, with the major exception being those industries that were the most highly concentrated.

The 1941 law provided for the establishment of "control associations," each one organized by specific industry. Each association was given the power to control output and to allocate inputs, including raw materials, labor, and capital. By the time the War ended, these control associations had formed a complex network with "enormous outreach" in the economy.

The establishment of control associations in 1941 was not imposed on business by military leaders. Rather, this "new economic structure" reflected business desires. If anything, business leaders criticized the government for the slowness with which it acted in adopting the plan. Whatever might have been the demands of the war effort, the legislation actually served to legitimize then-current zaibatsu efforts at price-fixing, market division, and output limitations.

The control associations gave the zaibatsu increased control over the economy. Zaibatsu officials were often appointed as presidents of the associations, a position that carried great power over the particular industry.

45 See T.A. Bisson, Japan's War Economy 5, 64-65 (1945) [hereinafter Bisson, War Economy]; Oshima, supra note 44, at 261-62.

46 See Oshima, supra note 44, at 268 (indicating cartels exist in "every industry"). For other estimates, see Corwin D. Edwards, Trade Regulations Overseas: The National Laws 652 (1966) (quoting one source as listing 31 cartels formed under the 1931 Major Industries Control Law, 53 other domestic cartels, and 26 export cartels; giving another estimate that by the end of 1936, the 1931 law had been applied to "more than one hundred branches of industry").

47 See Bisson, War Economy, supra note 45, at 78. It is not clear exactly how many such associations there were. Compare id. at 157 (314 as of February 1944) with Hadley, supra note 6, at 368 (1538 associations "coming to the attention of SCAP [Supreme Commander for the Allied Powers]" after the war ended, citing draft SCAP document). See also Report of The Mission on Japanese combines, otherwise known as the Zaibatsu Mission ch. 4, exh. III, at 2 (listing control associations [Tosei Kai] formed under the 1941 law, and indicating associations established in 19 major industries, from autos to shipbuilding; list compiled after the War by the government of Japan) [hereinafter Edwards Report], microformed on General Headquarters/Supreme Commander for the Allied Powers Records ("GHQ/SCAP"), National Archives and Records Service, Allied Operational and Occupation Headquarters, World War II [hereinafter National Diet Library Microforms], Sheets ESS (A)-02447-48 (National Diet Library (1982)).

48 See Oshima, supra note 44, at 262.

49 See Bisson, Zaibatsu Dissolution, supra note 24, at 12-13. Note that the legislation did not include a provision for coordination among the control associations, which would have been critical for the overall allocation of scarce resources during a war. This left each industry free to pursue its own profit-seeking goals. See Bisson, War Economy, supra note 45, at 94, 156.

50 See Oshima, supra note 44, at 263-64 (quoting the Commerce Minister as saying that the head of the steel associations "will have the power of a steel minister"); Edwards Report, supra note 47, ch. 4, at 8.
ability to direct the associations; firms whose output was below a minimum level could not even have full membership in the control association, although they were still under the association’s control. Forced mergers of small businesses were often the result, coerced by the control association that could allocate (and withhold) scarce inputs.

D. Conclusion: Setting the Stage

The structural development of Japan’s economy of course reflects the impact of numerous historical and geopolitical factors, including Japan’s geographic and political isolation, its scarcity of natural resources, its political desire to retain its independence in the face of the West’s superior technology, and the extraordinary ability of Japan’s government and business leaders (and its workers) to adapt successfully to an industrialized world. Nevertheless, to say that this mix of forces was different for Japan than for other countries (or, more particularly, for the United States) does not mean that the resulting economic structure was not also affected by familiar economic forces.

For purposes of the coming antitrust law, what seemed most familiar was the willingness of firms in Japan to collude. This did not appear to reflect some peculiar “collectivist proclivity of the Japanese people” so much as more universal economic problems and goals. Thus, the push for integration through cartels that began in Japan in the 1920s (as well as the attempt to encourage mergers, a more complete form of integration) was advanced in Japan as an effort to rationalize manufacturing and eliminate “cutthroat competition.” These arguments in favor of cartelization were similar to those advanced at the same time in the United States for

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Note: (Presidents of control associations were frequently zaibatsu officials and were given great power “to direct the affairs of the industry on a national basis.”)

51 See Oshima, supra note 44, at 276.
52 See id. at 272-74; Edwards Report, supra note 47, ch. 4, at 8. (Between 1941 and 1943, at least 1354 firms, with ¥19,373 million in assets, were forced to merge.)
53 Hiroshi Iyori, Antitrust and Industrial Policy in Japan: Competition and Cooperation, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES 56, 61 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986) (“The frequently noted collectivist proclivity of the Japanese people manifests itself within and among business enterprises . . . .”). Iyori is a former Commissioner and career enforcement official of Japan’s Fair Trade Commission, the administrative body responsible for enforcing Japan’s antitrust law.
54 Many mergers followed passage of the 1931 law. See JOHNSON, supra note 41, at 111. For example, Yawata and five other companies merged in 1934 to become Japan Steel. Johnson indicates that the zaibatsu were more in favor of mergers than of cartels along the lines of the 1925 Act. See id.
55 See id. at 109.
cartelization, mergers, and other restrictions on competition.\textsuperscript{56} It was a movement seen in both countries that received particular impetus from the Depression, when the excesses of competition seemed quite apparent.\textsuperscript{57}

However skeptical one might generally be about complaints of "cutthroat" and "excessive" competition (arguments frequently voiced by business firms in the United States), the very fact that Japanese firms were described this way casts doubt on the view that firms in Japan are naturally at the cooperative end of the business culture spectrum. A more accurate view of the record of cartelization would be that firms in Japan, like firms elsewhere, sought to restrain competition when doing so would lead to higher profits. Otherwise, Japanese firms competed.

Even though the movement toward cartelization in many ways presents a familiar picture, there is an aspect of Japan's experience with cartels prior to 1947 that is somewhat puzzling. Cartel formation in modern Japan was lawful prior to the passage of the Antimonopoly Act in 1947. Economic theory would predict that in a permissive legal regime, cartels would be formed more readily than in a regime in which cartels are banned (banning increases the cost of cartel formation). Nevertheless, significant formal cartelization did not appear in Japan until approximately twenty years before the passage of the Antimonopoly Act (although cartelization did then become pervasive in the economy). Indeed, beginning in the 1920s, there was a perceived need for legislation to encourage and, subsequently, to mandate the formation of cartels.

That cartels were not widespread until they were formally encouraged by legislation casts further doubt on the conventional view that it is "natural" for firms in Japan to collude, while in the United States "competition" is said to be the natural state of affairs. If anything, the legal regimes of the 1920s and 1930s in the two countries assumed the situation to be the exact reverse. In the United States, where legislation is necessary to exempt cartels from the law's prohibition, the legal assumption is that firms will form cartels unless constrained by the government. In Japan, legislation was necessary to encourage cartels. The legal assumption seemed to have been that firms would not form cartels unless these cartels were approved by the government.

\textsuperscript{56} See for example, the National Industrial Recovery Act, which encouraged cartelization through the adoption of "Codes of Fair Competition." National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). Section 3 of the Act, which delegated to the President legislative power to approve codes, was invalidated as unconstitutional by Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

\textsuperscript{57} See ALLEN, supra note 29, at 11-14; JOHNSON, supra note 41, at 109.
The need for legislative sanction may also provide important insight into Japan’s regulatory culture. Hadley notes that “[e]arlier in Japan’s modernization, ‘guidance’ was handled through conversations between the pertinent ministers and the favored business houses.” This type of government-managed collusion, although still possible in a modern economy, became more cumbersome as Japan’s economy grew. Even so, purely private cartels were not the answer. In addition to needing government power to compel recalcitrant competitors to join, those who formed cartels apparently felt that government approval was necessary to confer legitimacy on their organizations. Government had the job of directing the national economy, which is consistent with a bureaucratic regulatory culture. Even if the government’s role or power was small in relation to the role and power of the zaibatsu, the cartel legislation of 1925 to 1941 shows that it was still necessary.

III. Two Views on Antitrust

A. Japan’s View

[...] fair and free competition alone cannot be the sole solution [to Japan’s economic problems] . . . . Planned and fairly strict State control of the economy [will be] required in the process of Japan’s economic democratization.

In June 1945, a group of economists and technical experts in Japan’s Greater East Asia Ministry anticipated Japan’s coming defeat and formed a group to study the problems of the post-War reconstruction of Japan’s economy. This group, which was named the Special Survey Committee (“SSC”), scheduled its first meeting for August 16, 1945, which turned out to be the day after the War ended. Between that date and March 1946, the
Committee met approximately forty times, receiving reports on various economic issues including small and medium-sized businesses and the zaibatsu.64 The SSC published the first version of its report in mimeographed form in March 1946. The SSC Report was subsequently translated into English and submitted to the Occupation authorities.65 The SSC Report was then revised and the final version was published in September 1946.66 “[B]ound with coarse straw paper, reflecting the conditions in Japan at that time,” it was “widely distributed” to government agencies and members of the National Diet.67 Although the Report’s proposals were not necessarily reflected “immediately and directly in the administration of the economy,” they did provide the “conceptual basis for the . . . economic rehabilitation plans drafted subsequently.”68

The SSC Report never mentions the word “antitrust.” Nevertheless, the Report provides a useful sense of Japan’s approach to certain economic issues that are critical to antitrust policy. The Report also gives us a sense of the enormity of the economic problems facing Japan and the Occupation authorities.

In the immediate aftermath of the War, Japan needed jobs for seven million demobilized soldiers, four million factory workers from munitions production, and one and one-half million individuals returning from abroad.69 The 1945 rice harvest was two-thirds of what was expected; at the end of the War “every Japanese national [was driven] into a frantic search for food.”70 In the fall of 1945, the Pauley Reparations Mission had designated the facilities that were to be considered for reparations. Half of Japan’s machine tool and steel plants were included.71 “[H]eavy and chemical industries were expected to receive a blow that would all but annihilate them.”72 Inflation was also “progressing steadily,”73 soon to be

64 Id. at xviii; SSC REPORT, supra note 33, at 4.
65 Omori, supra note 62, at xix.
66 Id. at xix; SSC REPORT, supra note 33, at 4-5.
67 Omori, supra note 62, at xxi.
68 Id. at xxviii.
69 Takafusa Nakamura, Introduction 1 to SSC REPORT, supra note 33, at x.
70 SSC REPORT, supra note 33, at 60; Nakamura, supra note 69, at x.
71 Nakamura, supra note 69, at x.
72 Id. The Report also details the expected impact of reparations in aircraft, ball bearings, shipbuilding, iron and steel, electric power, sulfuric acid, soda, and light metals, with an expected loss of an additional 300,000 jobs. See SSC REPORT, supra note 33, at 56-59. Reparations were subsequently reduced considerably, however. See HADLEY, supra note 6, at 146.
73 SSC REPORT, supra note 33, at 61.
worsened by the need to repay debts incurred during the War plus the costs of stationing the Occupation forces.\footnote{Id. at 63.}

The SSC Report points out that, with the War’s end, Japan had lost forty-four percent of its territory (that is, its former colonies) “all at once.”\footnote{Id. at 44-45.} This would affect not only food supply.\footnote{See id. at 60.} Approximately half of Japan’s exports had gone to its colonies (eighty percent of Korea and Taiwan’s imports were from Japan).\footnote{Id. at 46.} The loss of its colonies would have a substantial impact on Japan’s competitiveness in foreign markets. The SSC Report states:

The loss of such monopolistic markets will deprive Japan of the benefit of reinforcing its competitiveness in other free markets by making its monopolistic profit in these areas into a foothold. This will not only bring about an outright reduction in the nation’s exports to these areas but also have an impact even on its exports to other markets.\footnote{SSC REPORT, supra note 33, at 46. Cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) (involving a claim that defendant consumer electronics firms had engaged in a predatory cartel to drive U.S. firms out of the market, with the cartel’s low prices in the United States being financed by high profits in Japan; the court affirmed summary judgment for defendants and held that such a conspiracy was implausible because plaintiffs’ claim “made no economic sense” and was “economically irrational”).}

Addressing the necessary measures for reconstruction, the SSC Report states that the only course “is to democratize the economy and elevate technological standards.”\footnote{SSC REPORT, supra note 33, at 78.} This will require, first of all, the “prohibition of industrial monopoly.”\footnote{Id. at 81.} The zaibatsu had “reigned” over a “wide variety of enterprises not connected with each other, and controlled both financial institutions and industries with one and the same capital. Overwhelming their medium and small-sized competitors, they seized and monopolized the greater part of the Japanese economy.”

The SSC Report describes this imbalance between large and small companies as critical in explaining Japan’s political problems. The existence of smaller firms “enabled big companies to expand their business while evading—by the utilization of subcontract systems—the risks that
might have been incurred had they invested their own capital, and [enabled them] to keep production costs low thanks to the lower wages the smaller enterprises paid to workers.”82 But cheap labor then led to underdeveloped domestic markets:

The big industries that had been constructed through the sacrifice of farmers and small-sized businesses, however, consequently had difficulty finding markets within the country because of the extremely poor purchasing power of the majority of people, and were compelled to strive to secure export markets while looking to the government for large demand due to military expansion. Thus was the foundation built for Japan’s progress toward becoming a militaristic and aggressive nation.83

In addition to the political benefit that would flow from developing thin domestic markets, the SSC Report notes that a democratic and open economy would advance the economic interests of consumers. Having “a large number of independent business enterprises” will bring “benefits to consumers through the active progress of technology and efficiency . . . .”84 In a reconstructed economy, the SSC Report concludes, “the emergence of monopolistic big business will be checked, and the establishment of an economic system centered around free competition among medium and small enterprises encouraged hereafter.”85

Nevertheless, the SSC Report rejects the idea that this necessary democratization be accomplished “American style.” In the United States, the Report observes, “democracy is so closely tied to economic abundance that once a political democracy is realized, no big problems will arise even if the economic life of individuals is left to free competition.”86

According to the SSC Report, the situation was different in Japan, which meant that the state would have a continuing role in the economy. For one, the state would have to take over the tasks performed by the zaibatsu. These tasks included the “positive role” of raising and directing the flow of investment capital, spreading commercial networks around the world, developing “high-level engineering abilities and modern managerial

82 Id. at 27.
83 Id. at 28.
84 Id. at 82.
85 Id.
86 Id. at 83.
capacities,” and fostering the growth of heavy industries. For another, in light of the “extreme destitution” in which Japan found itself, there would be a necessary process of reconstruction which would require government year-to-year planning. “The waste of economic power that would result from allowing laissez-faire play to market forces will not be permitted...."

The SSC Report also recognizes certain economic problems that could arise in restructuring an economy away from zaibatsu control and toward smaller enterprises. Foremost is the question of Japan’s ability to compete in major industries in foreign markets. Quite clearly, the drafters of the SSC Report did not intend for Japan to give up its policy of exporting industrial goods abroad (even if the drafters also wanted to increase the depth of domestic consumer markets at the same time). But the Report sees two intertwined economic problems for such industries. First, many of these industries (such as steel, coal, and fertilizer manufacturing) “absolutely need large-scale operations.” In Japan, however, “where domestic markets are small and the raw material base is weak, free competition in these basic industries would not necessarily result in their growth....” Second, these industries face the problem that “in capitalistic free competition many Japanese industries will be overwhelmed by gigantic modern foreign industries, and Japan’s industrial structure will thus be deformed.” Free markets could not be relied upon to produce the proper economic results. State policies would need to be adopted that would “keep at least basic industries intact.”

The SSC Report shows more willingness to rely on market forces for other industries. “[T]hose basic industries which serve domestic nongovernmental or export demand and do not necessarily require a large-scale operation need to be encouraged to compete as freely and fairly as possible.” Nevertheless, the Report does not envision an atomized small business sector. Indeed, it urges various cooperative approaches (including

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87 Id. at 84.
88 Id. at 94.
89 See, e.g., id. at 113-14 (stating that after democratization, heavy industries should be allowed to grow and compete internationally). The Report defines heavy industries as “metal, machinery, chemical, ceramic, and earth and stone industries.” Id. at 37. SCAP criticized the Report’s first draft for recommending renewed growth in heavy industries, but the recommendation was not removed in the final draft. See Omori, supra note 62, at xix.
90 SSC REPORT, supra note 33, at 115.
91 Id.
92 Id. at 85.
93 Id. The Report suggests that the need will arise “to nationalize these [basic] industries or give them a public character.” Id. at 115.
94 Id.
competition among collectivized groups of firms and the continued use of industrial control associations), which would allow smaller enterprises to achieve some of the rationalization benefits of larger-scale enterprise.\(^9^5\)

There is also a continuing concern over the impact of a competitive domestic marketplace on foreign trade, which the Report believes would have to be carried forward by smaller enterprises.

Because Japan's export items in the future will mostly be the products of smaller manufacturing firms, reckless competition among Japanese exporters themselves in overseas markets will bring about lower prices for the exports, regardless of their production costs, and will force exploitation of labor again in small domestic enterprises as was the case in the past. It is therefore desirable to build a trade mechanism which is forceful and efficient and protects the benefits of small domestic producers.\(^9^6\)

**B. The United States' View**

Something has been seriously wrong with the social system of Japan. Since the Meiji restoration monopolistic ventures have been the focus of Japanese foreign policy . . . . The industrial revolution has failed to produce the democratic, humanitarian, and cosmopolitan sentiments which were its counterpart in most countries . . . .\(^9^7\)

On January 6, 1946, a joint State Department and War Department group went to Japan for a two and one-half month stay. Although formally called "The Mission on Japanese combines, otherwise known as the Zaibatsu Mission," the mission was referred to in all subsequent memoranda as the "Edwards Mission," an allusion to the head of the mission, Corwin Edwards.

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\(^9^5\) See, e.g., id. (recommending that the toseikai [control associations] be reorganized to represent the "collective will" of businessmen); id. at 117-18 (favoring "promotion of cooperation among smaller enterprises"); id. at 126 (suggesting that "democratic associations of small commercial firms" will build "a democratic industrial structure" along with small manufacturers and farmers unions).

\(^9^6\) Id. at 127. The argument that the low opportunity cost of labor would lead to destructive competition has been made to explain motor carrier entry regulation in the United States. *See* ALFRED E. KAHN, 2 THE ECONOMICS OF REGULATION 180-81 (1971).

\(^9^7\) *See* Edwards Report, *supra* note 47, at 1.
The Edwards Mission's mandate was to consider "the ways and means that would effectively destroy the power of the zaibatsu."\textsuperscript{98}

The report of the Edwards Mission ("Edwards Report") begins by drawing a connection between concentrated economic power and problems of Japan's social and political structure. After noting that there was no independent middle class or vigorous labor movement in Japan, and no great "surge" in the standard of living as industrialization proceeded, the Report continues:

Doubtless no single condition is responsible for these peculiarities. The excessive concentration of economic power in Japan is, however, one of the more important conditioning factors. Instead of the diffused business initiative which gives rise to a middle class, Japan's industry has been largely under the control of a few great combines, . . . all of which have enjoyed preferential treatment from the Japanese government. This type of industrial organization tends to hold down wages, to block the development of labor unions, to destroy the basis for democratic independence in politics, and to prevent the rise of interests which could be used as counterweights to the military designs of small groups of ambitious men.\textsuperscript{99}

The Edwards Report then proceeds to make the identical argument for the connection between Japan's economic structure and its foreign policy that the SSC Report makes.\textsuperscript{100}

\textit{The low wages and concentrated profits which are produced by such a structure have been inconsistent with the development of a domestic market capable of keeping pace with the increased productivity of Japanese industry; and in consequence Japanese business has felt the need to expand its exports . . . to make up for the deficiency of domestic consumption. This drive for exports and for imports of raw

\textsuperscript{98} Id. ch. 1, at 7. The Edwards Mission left Japan on March 15, 1946. Id. at 1. Although the original of the Edwards Report does not contain an exact date of completion, the Report was transmitted to the Joint Chiefs of Staff on May 28, 1946. National Diet Library Microforms, \textit{supra} note 47, Sheet ESS (A)-02444.

\textsuperscript{99} Edwards Report, \textit{supra} note 47, at 1.

\textsuperscript{100} See \textit{supra} note 83 and accompanying text. The SSC's first report was published in Japanese in March 1946, about the time that the Edwards Mission was finishing its work in Japan. See \textit{supra} note 66 and accompanying text.
materials has been an outstanding motive of Japanese imperialism. Thus the concentration of Japanese wealth and economic power must carry a substantial share of the responsibility for Japanese aggression.\textsuperscript{101}

In critiquing the zaibatsu, however, the Edwards Report does not simply equate the zaibatsu with "monopolies." Treating the two as identical, in fact, is more the analytical failing of the SSC Report than the Edwards Report.\textsuperscript{102} Instead, after noting that few firms had high market shares, the Edwards Report continues, "The relative rarity of such concentrations in single industries, in contrast with the instances of all-encompassing spread, constitutes one of the peculiarities of the zaibatsu structure."\textsuperscript{103}

The distinction between monopoly and multi-product oligopoly is an important one, and it leads the Edwards Report away from the traditional grounds for condemning monopoly (monopoly profits and limitations on output) toward a concern for the strategic use of power by the zaibatsu to gain economic advantage over competitors. The Edwards Report observes that "[t]he extreme diffusion of interests of the larger zaibatsu affords a means to attack [smaller competitors] from many directions simultaneously and to reach vulnerable points in a concern engaged in practically any line of business."\textsuperscript{104} The Edwards Report catalogues the strategies. The zaibatsu (1) controlled the banks and could block new financing; (2) had business of sufficient scope to enable them to interfere with or cut off raw materials and supplies "to a small competitor"; (3) had wide interests in general trading, making the sale of goods outside pure local markets "largely dependent upon zaibatsu cooperation, or at least toleration"; and (4) employed exclusive dealing contracts to "interfer[e] with or prevent small concerns from securing supplies and disposing of their finished products."\textsuperscript{105} The Edwards Report concludes that "[a]ll of the well known devices of monopolistic power are available for use against small competitors or as a means by which the zaibatsu may extend their grasp into all types of business."\textsuperscript{106}

\textsuperscript{101} Edwards Report, supra note 47, at 1-2. See also COHEN, JAPAN'S POSTWAR ECONOMY, supra note 37, at 21 (indicating that before the War, a "limited domestic market" plus low wages forced Japanese firms to "look abroad" for markets).
\textsuperscript{102} Compare with supra note 81 and accompanying text.
\textsuperscript{103} See Edwards Report, supra note 47, ch. 2, at 10. This observation comes after 1½ pages which simply list the businesses in which Mitsui was engaged.
\textsuperscript{104} Id. at 10.
\textsuperscript{105} Id. at 24.
\textsuperscript{106} Id.
The focus on the zaibatsu also includes an analysis of the control associations, which were not an area of concern on the Japan side. The Edwards Report argues that the growth of the zaibatsu had been facilitated by the cartel legislation that led to the formation of the control associations. This legislation "[gave the] force of law to the path they [the zaibatsu] wanted to pursue." The Edwards Report also suggests, however, that the cartel legislation reflected deeper patterns of collusion in Japan’s economy. "In many ways the laws were a projection of natural inclinations and training of the Japanese, the encoding of practices which had persisted for so long as to have become habits."

The first, and most obvious, policy recommendation for the Edwards Report was dissolution. If the zaibatsu concentrated economic power, then the logical policy prescription was to dissolve the zaibatsu and deconcentrate economic power, which the Edwards Report recognizes as a formidable task. The Report also calls for the dissolution of the control associations, which were not only connected to zaibatsu power, but also exercised the economic power of industry-wide cartels. The Edwards Report condemns this exercise of power in political terms familiar to antitrust jurisprudence. "[T]he exercise of broad governmental powers by private business groups is inconsistent with the democratic structure of industrial society which is our purpose to achieve."

The Edwards Report also states that once the zaibatsu were destroyed there would be a "second task," to change "the environment of law and opinion." This would start with antitrust.

The complete absence of any anti-trust laws in Japan has been one extremely significant factor [in the growth of the zaibatsu]. Large concerns have had full opportunity to use their strength

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107 The SSC Report wanted to continue the use of such associations. See supra note 95 and accompanying text. The Edwards Report notes that from the fall of 1945 through the first months of 1946, the government of Japan had taken no definite action regarding the control groups. Although conferences were held and some associations voluntarily disbanded, the Japanese "at the same time formed new organizations similar in effect." Still other associations "not only were not abandoned, but continued to make every effort to maintain the control over the industry concerned and to demand compliance of member companies." Edwards Report, supra note 47, ch. 4, at 9-10.

108 Id. ch. 4, at 1.

109 Id.

110 See, e.g., id. ch. 5, at 1 (indicating that it is "improbable" to find enough new owners for zaibatsu properties); id. ch. 6, at 6. ("To dissolve the zaibatsu, however, is to shift the control of half the business world of Japan.")

111 Id. ch. 6, at 57. See, e.g., Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457, 465 (1941).

112 Edwards Report, supra note 47, ch. 6, at 66.
without legal hindrance. Under such conditions the strong have
grown on their own strength and the weak have been
defenseless.\textsuperscript{11}

The Edwards Report does not offer a ready draft of an antitrust
statute, but the Report does offer some fairly detailed recommendations for
its content. These recommendations make a conscious effort to account for
the Edwards Mission’s understanding of how Japan’s industrial organization
and governmental structure differed from comparable systems in the United
States. The recommendations were not an attempt to replicate U.S. law, but
to tailor an approach that would deal with Japan’s problems. Indeed, the
Edwards Report states that “the antitrust laws of the United States would be
an \textit{inadequate} model for Japan.”\textsuperscript{14} U.S. antitrust laws have been
“insufficient to prevent the rise of giant industrial combines possessing
excessive power because of their size.”\textsuperscript{15} The Edwards Report states further
that U.S. antitrust law is set out in language “so general that, against the
background of traditional Japanese thinking, the interpretation of a law
based exclusively upon similar phrases would be likely to vitiate an antitrust
program.”\textsuperscript{16} Finally, the Edwards Report asserts that the U.S. antitrust laws
are placed within the context of a federal system, an independent judiciary,
and a quasi-judicial commission (the Federal Trade Commission). “The
Japanese Government has none of these features.”\textsuperscript{17}

The Edwards Mission’s central focus may have been the zaibatsu and
deconcentration, but the Edwards Report begins its antitrust
recommendations with provisions on conduct, not structure. The Report
states that “[t]he first element in a Japanese antitrust law should be
prohibition of types of concerted business activity.” It goes on to state that
for those types of activities where the burden “is obvious,” the activity
should be “specifically forbidden in the statute” (i.e., per se unlawful).\textsuperscript{18}
The Report singles out the following behaviors for prohibition: “concertedly
to fix prices, restrict output or sales, allocate markets, commodities, or
customers, restrict new investments, restrict productive methods, research,
or the adoption of new technology, or exclude enterprises from any line of

\textsuperscript{11} Id. ch. 2, at 23.
\textsuperscript{14} Id. ch. 6, at 67 (emphasis added).
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 68.
industrial activity or from access to any market, customer, or source of supply.\footnote{19}

The Edwards Report's emphasis on conduct is not surprising. The Mission viewed the collusive structure of Japan's economy as both supportive of the zaibatsu and as a tool used by the zaibatsu to restrain the competitive efforts of smaller enterprises. What is interesting is that the recommendations go beyond the state of the U.S. law at that time by condemning certain particular exclusionary practices designed to keep out new competitors.\footnote{20} Indeed, the Report emphasizes that coercive and exclusionary practices that deny the opportunity to compete should be condemned, whether they are done concerted or not. "The statute should also prohibit activity, concerted or individual, which has the purpose or effect of coercing business enterprises to conform to business policies or participate in programs carried on by the coercing concern or group or which is designed to drive selected enterprises out of any line of business."\footnote{21}

Specifically mentioned practices are "intimidation of a rival's customers, concerted cutting off of supplies of materials or credit or channels of distribution, and sale to a rival or rival's customers at discriminatory prices."\footnote{22}

The need to go beyond "inadequate" U.S. law was even clearer when it came to the proposed structural recommendations. The Edwards Report suggests that the statute should not only prevent monopoly, but should also prevent firms from becoming "so large in their aggregate size that they seriously jeopardize the opportunity of other business enterprises to compete."\footnote{23} Such a statute would require a strict antimerger standard. The Edwards Report recommends that the acquisition of competitors be forbidden, with the exception of acquisitions of negligible size. Acquisitions of non-competitors should be forbidden unless prior notice is given to an antitrust agency and that agency "has found that the project offers

\footnote{19}{Id.}
\footnote{20}{For example, there was no U.S. antitrust precedent dealing with concerted restrictions on investment (as opposed to output). \textit{See} United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940). The closest cases to concerted restrictions on technology involved restrictive licensing by patent pools, rather than direct agreements restricting technology. \textit{See}, \textit{e.g.}, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) (glass container patent pool). The first case directly attacking an agreement to restrict the adoption of new technology did not come until 1969 and was not litigated on the merits. \textit{See} United States v. Automobile Manufacturers Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969) (joint development of automobile emissions technology), \textit{aff'd sub nom.}, City of New York v. United States, 397 U.S. 248 (1970).}
\footnote{21}{Edwards Report, \textit{supra} note 47, ch. 6, at 68.}
\footnote{22}{Id. at 69.}
\footnote{23}{Id.}
affirmative public advantages and entails no substantial risks of monopoly or of excessive size."

These recommendations come close to condemning size per se, but the Edwards Report disclaims reliance on "a mechanical ceiling upon assets, volume of business done, or number of employees." It instead envisions a more probing assessment of the need for size in a particular industry. "Technological and administrative needs differ from industry to industry as to those matters, and presumably the size appropriate to efficient industrial organization will change from decade to decade with new developments in technology and in managerial devices..." In recommending so severe a limit on acquisitions, the Report moved substantially beyond the antimerger provisions in the Clayton Act at that time, which did not even apply to assets acquisitions and had been so undermined by Supreme Court decisions as to have become a dead letter.

In fact, the model used in the Edwards Report is the Public Utility Holding Company Act, a more recently adopted law which dissolved the complex holding company structures prevalent in the power industry and placed strict limitations on the ability of public utility companies to make acquisitions that were not functionally related to their businesses. Specifically referencing that statute, the Report recommends that

the rule of thumb to be used in appraising corporate growth should be that of technological and structural unity. A concern should not be allowed to grow larger than other enterprises by bringing together under a single control activities which are not substantially related in origin of materials, productive operations, distributive channels, or final use. It should not be allowed to assemble related activities when they are so numerous, so extensive, or so diverse in location, production or other factors that common management ceases to be feasible.

Consistent with the Edwards Mission's understanding of Japan's industrial organization, the Report's reference to structural prohibitions in the Public Utility Holding Company Act does not emphasize the allocative

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124 Id. at 69.
125 Id. at 70.
128 Edwards Report, supra note 47, ch. 6, at 70.
inefficiencies of monopoly as much as the strategic advantages over competitors that are available to conglomerate firms.

The purpose of a limit upon size should be to prevent the acquisition of disproportionate bargaining strength based upon such factors as financial resources, ability to sustain a position in one industry from the profits made in another, ability to give discriminatory advantages to affiliated concerns, and ability to overawe suppliers and customers.\(^\text{129}\)

The Edwards Report, however, does not envision an industrial structure where each firm would have the “exact market strength” of its competitors. Instead, it states that the “dynamic possibilities” of “a clear technological gain” in some large enterprises need not be sacrificed.

However, there is no need to accept substantial disparities in bargaining power where they are accompanied by no technological advantage. The power of the zaibatsu combines offers one of the world’s most striking illustrations of bargaining strength which has outrun economic necessity. The purpose of the law against size should be to bar similar developments in the future.\(^\text{130}\)

This notion of “substantial disparities in bargaining power” is perhaps the most novel part of the Edwards Report’s antitrust recommendations. The idea that firms with monopoly position might use their power to exclude rivals was well-accepted at the time in U.S. antitrust law,\(^\text{131}\) but this concept had never been detached from monopoly and put into a context of absolute firm size or multi-market occupancy. To the Edwards Mission, however, “substantial disparities in bargaining power” identified a significant structural economic problem in Japan, one that needed to be remedied if the zaibatsu were to be prevented from returning.\(^\text{132}\)

\(^{129}\) Id. at 70.

\(^{130}\) Id. at 70-71.

\(^{131}\) For a relatively contemporaneous view, see United States v. Griffith, 334 U.S. 100 (1948) (defendant motion picture exhibitors used monopoly position in certain towns to coerce distributors to give them preferential treatment in markets where they faced competition).

\(^{132}\) The Edwards Report does not make clear, however, whether it was recommending a general limit on firm size no matter how achieved (e.g., through internal growth) or whether its concern for “disparities in bargaining power” could be dealt with simply by placing strict restrictions on growth through the acquisition of other companies.
The Edwards Report's recommendations for an antitrust statute end with a discussion of provisions relating to enforcement. Despite the earlier recognition of the differences between the structures of the U.S. government and Japan's government, these recommendations lack any features tailored specifically to Japan's situation. The Edwards Report recommends a "specialized [enforcement] agency with no other duties." The agency would need to operate at the "highest levels" of Japan's government, because antitrust matters "are subject to the play of very powerful interests." The agency must have the power to initiate investigations, undertake remedial action, and force production of documents and the attendance of witnesses. It should also "be empowered to prosecute and punish offenses," with penalties available against enterprises and their officers. "[V]igorous administration of the law is necessary."

C. Conclusion: Two Views

At its heart, the Edwards Mission viewed the zaibatsu (indeed, Japan's economic structure) in terms broader than economic efficiency. Corwin Edwards was later described as someone who saw "free competition as a universal ethical good. To him, democracy meant freedom of choice, whether of goods, policies, or people." The proposals put forward in his Report ultimately reflected this political philosophy.

The Edwards Report stresses the importance of competition in open markets, in which all firms would have an opportunity to compete, particularly smaller enterprises that had been the targets of zaibatsu exclusionary practices. This led the Edwards Report to advocate not only the dissolution of the zaibatsu, but also continuing antitrust prohibitions on conduct that might exclude firms from markets.

Japan's policymakers also viewed the zaibatsu in a political context. Even if they did not have as clear a political preference for "free competition" as did Edwards, in the SSC Report they saw that an open

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133 Edwards Report, supra note 47, ch. 6, at 71.
134 Id. at 72.
135 Id.
136 Id. at 71.
137 THEODORE COHEN, REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL 355 (Herbert Passin ed., 1987) [hereinafter COHEN, REMAKING JAPAN]. Cohen, a major participant in the Occupation, claims that the choice of Corwin Edwards "was the single most important decision in the setting of zaibatsu policy" because of Edwards' convictions in favor of deconcentration followed by antitrust enforcement. See id.
economy was necessarily connected to democratizing Japan and altering its political policies.

The SSC Report clearly recognizes the importance of opening markets to permit smaller firms to compete. This is part of "economic democratization" and government action is necessary for its realization. "[The] 'reconstruction of smaller businesses' will require the provision of external conditions in which big business monopolies are prohibited in order to give the small businesses freedom of economic activity . . . ."  

On the other hand, the SSC Report shows a concern that the deconcentration of the economy might lead to the loss of the efficiencies of large firms (e.g., scale economies in manufacturing, capital formation, and management). Even though the SSC Report acknowledges the importance of encouraging smaller business and building the domestic economy, it is not prepared to give up large firms if that means sacrificing Japan's role of exporter of industrialized goods to world markets. This concern for preserving scale economies was to be a continuing theme in the coming negotiations over the antitrust law, and a continuing source of disagreement.

The main disagreement between the two sides, however, was institutional, relating in large measure to the regulatory culture with which each side was familiar. The Edwards Mission saw the market as the prime regulator of economic affairs. Putting aside exemptions for natural monopolies and public utilities, the Edwards Mission believed that economic policy for industry in Japan would be taken care of by private decisions controlled by market forces. The government's role was to be that of policeman, using antitrust law to protect weaker firms from exclusionary tactics and to protect consumers from cartel behavior.

In embracing strong antitrust legislation, the Edwards Mission naturally made use of the policy tools with which its members were familiar. Corwin Edwards, an economics professor who specialized in industrial

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139 Id. at 117.
140 The Report clearly did not see Japan taking a secondary role in the world economy:

Some opinion holds that Japan should become a country like Denmark, which earns its livelihood by the processing of farm products . . . . With geographical conditions quite different from those of Denmark, Japan will have difficulties feeding its population of 80 million unless efforts are made to develop the manufacturing industry . . . .

Id. at 140.
141 The Edwards Report recommended an exemption from antitrust for "natural monopolies and public utilities which have been subjected to detailed governmental regulation of their prices, service, and profits." Edwards Report, supra note 47, ch. 6, at 73. See also id. at xi. ("Control legislation should be terminated except where it serves a public purpose.")
organization economics, was at the time a consultant on cartels to the State Department. Of the seven other members, three were special assistants from the Antitrust Division of the Justice Department. The others were from the Federal Trade Commission, the Securities and Exchange Commission, the Federal Power Commission, and the Tariff Commission. It should not be surprising, therefore, that the main models for their legislative proposals turned out to be the Sherman Act, the Clayton Act, and the Public Utility Holding Company Act of 1935.

The SSC Report does not evidence as much faith in the market mechanism as the Edwards Report and it, too, embraces the policy tools with which its authors were familiar—control associations and government economic planning and guidance. If Japan’s economic power was to be rebuilt, the free market could not be the institutional tool for allocating resources. The state would be required to bear that responsibility. As will be seen, this lack of faith in markets had a greater affect on Japan’s approach to the mechanisms of antitrust enforcement than on the substantive antitrust provisions for which Japan would later negotiate.

IV. DRAFTING THE STATUTE

A. Starting the Process

On September 2, 1945, representatives of the government of Japan formally surrendered to representatives of the Allied Powers aboard the
battleship Missouri in Tokyo Bay.\textsuperscript{146} Two months later, on November 6, 1945, General MacArthur, as Supreme Commander for the Allied Powers ("SCAP"), issued a directive accepting a plan proposed by Japan’s government for dissolving the main holding companies of the four major zaibatsu.\textsuperscript{147}

MacArthur’s directive went beyond Japan’s somewhat modest proposal, however. For one, he ordered Japan’s government to prohibit Japanese participation “in private international cartels or other restrictive private international contracts or arrangements.”\textsuperscript{148} More significantly, he announced SCAP’s intention “to dissolve the private industrial, commercial, financial, and agricultural combines in Japan” so as to permit a “wider distribution of income and ownership” and to encourage economic institutions “that will contribute to the growth of peaceful and democratic forces.”\textsuperscript{149}

To accomplish this objective MacArthur directed Japan’s government to “promptly present” for SCAP’s approval plans for dissolving all “combines” in addition to the four major zaibatsu holding companies. He also directed Japan’s government to prepare a program for the enactment of such laws as will eliminate and prevent private monopoly and restraint of trade, undesirable interlocking directorates, undesirable intercorporate security ownership, and the segregation of banking from commerce, industry and agriculture and as will provide equal opportunity

\textsuperscript{146} See DEPARTMENT OF STATE, OCCUPATION OF JAPAN: POLICY AND PROGRESS 5-6 (Publication 2671, n.d.).

\textsuperscript{147} See SCAPIN 244, Nov. 6, 1945, ¶ 1, reprinted in SCAP HISTORY, supra note 4, app. 1 at 1. The zaibatsu dissolution proposal, known as the Yasuda plan, was actually drafted by Yasuda Hozensha, one of the four major zaibatsu. It was presented to the United States through Japan’s government. For discussion of the Yasuda plan, see HADLEY, supra note 6, at 86. The plan is reproduced in Hadley’s volume. Id. at 460-61.

\textsuperscript{148} It appears that the State Department did not approve of General MacArthur accepting the dissolution plan and asked the War Department to tell MacArthur not to do so (MacArthur did so anyway). Instead, recognizing that the “problem of breaking up the ‘Zaibatsu’ is too complicated and important for superficial handling,” the State Department determined to send “a small group of experts in this field to Japan to examine the ‘Zaibatsu’ organizations at first hand” and requested the head of the Antitrust Division to assemble the group. Letter from William L. Clayton, Assistant Secretary of State for Economic Affairs, to Assistant Attorney General Berge (Oct. 31, 1945), supra note 144, at 811. The Edwards Mission was the result, sent to Japan to help formulate zaibatsu policy in light of the issues the Yasuda plan raised. See Edwards Report, supra note 47, ch. 1, at 5.

\textsuperscript{149} SCAPIN 244, supra note 147, ¶ 7, at 2.

\textsuperscript{149} Id. ¶ 5.
to firms and individuals to compete in industry, commerce, finance and agriculture on a democratic basis.\textsuperscript{150}

Although this order does not, by its terms, mention antitrust, it does reference the basic scope of an antitrust statute ("prevent private monopoly and restraint of trade"). By requiring laws that provide for “equal opportunity . . . to compete . . . on a democratic basis,” the directive also explicitly embraces a political philosophy long associated with antitrust.\textsuperscript{151} This order came to be the only one issued by SCAP about antitrust legislation.\textsuperscript{152}

The lack of specificity in MacArthur’s directive with regard to antitrust legislation and, indeed, with regard to a program for dealing with the zaibatsu, came from a simple fact—the United States had no comprehensive policy for Japan’s post-War economic structure.\textsuperscript{153} This may explain why MacArthur gave the government of Japan the task of drafting antitrust legislation.

An initial effort at drafting an antitrust statute, undertaken by the Ministry of Commerce and Industry, produced the “Bill of Industrial Order” in January 1946.\textsuperscript{154} This proposal aimed at a system based on economic control laws and was, in effect, a “miniature version” of the 1931 Important Industries Control Act.\textsuperscript{155} It was not what SCAP had in mind.

More serious work on producing an actual statute began while the Edwards Mission was in Japan from January to March of 1946. The Edwards Report optimistically states that “[p]reliminary work is under way both in SCAP and in the Japanese government looking toward the formulation of a Japanese antitrust law.” The Mission also reported on two conferences that it attended with “groups of Japanese officials” about “alternative lines of policy in dealing with monopoly problems and about technical issues which arise in formulating such a law.”\textsuperscript{156}

\textsuperscript{150} Id. ¶ 6c.
\textsuperscript{151} See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 76 (1911) (condemning Standard Oil for its “intent to drive others from the field and to exclude them from their right to trade”); United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 323 (1897) (noting that the trusts used predatory pricing to drive out of business independent “small dealers and worthy men”).
\textsuperscript{152} See Lester N. Salwin, Japanese Anti-trust Legislation, 32 MINN. L. REV. 588, 588 (1948).
\textsuperscript{153} See COHEN, REMAKING JAPAN, supra note 137, at 354.
\textsuperscript{154} See IYORI & UESUGI, supra note 6, at 16. The Ministry of Commerce and Industry was the predecessor of the Ministry of International Trade and Industry (“MITI”).
\textsuperscript{156} Edwards Report, supra note 47, ch. 1, at 10. Edwards wrote sometime later that while he was in Japan on the Mission, “to a Japanese official, frankly puzzled by American ideas about competition, asked me
The Edwards Report was transmitted to the Joint Chiefs of Staff on May 28, 1946. The Edwards Report proved to be highly controversial, generating “comments and comments on comments” from the Department of the Army and from SCAP. The criticism, however, was focused on the Edwards Report’s recommendations for zaibatsu dissolution and its numerous other structural reforms. With regard to the specific recommendations for antitrust legislation, there was no opposition. SCAP’s comment was, simply, “concur.”

This bifurcation of interest between the program of deconcentration and the task of writing an antitrust law had an important impact on the subsequent development of antitrust legislation in Japan. Deconcentration was the overarching issue, presenting immediate practical problems that needed solutions. Questions were raised, such as: What assets did the zaibatsu own? What companies should be split up? Who would own the new companies? In the United States, the problem of dissolution had been difficult enough in individual antitrust cases and the failures of effective dissolution had long been criticized. Wouldn’t it be even more difficult to accomplish effective dissolution on a massive scale in an occupied foreign country?

Writing an antitrust statute, by contrast, was not such a pressing or difficult job. Its effects were less immediate and, as with any law designed to affect future behavior and requiring institutional enforcement, were difficult to predict. Given the existence of the antitrust policy recommendations in the Edwards Report, writing an antitrust statute no doubt appeared to be a technical job of supplying the correct legislative

to suggest readings that would help him understand them.” Unfortunately, the only readily available books were critiques relating to the extent to which competition policy should be followed, “not to exposition of the competitive idea to those to whom it was alien.” EDWARDS, supra note 46, at 720 n.46.

SCAP HISTORY, supra note 4, at 5. SCAP termed the “practical execution” of the Report’s recommendations to be “quite beyond the size and organization of the Occupation Forces as at present constituted . . . . To attempt in such detail the reorganization of a conquered country presents certain Utopian aspects which should be carefully considered before being attempted.” Memorandum from General Headquarters, Supreme Commander for the Allied Powers, Comments on The Report of the Edwards Mission 1 (n.d.) (marked “Confidential”) [hereinafter Comments on the Report of the Edwards Mission], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-00005. SCAP also expressed concern that the Report’s recommendations might place business in a “strait-jacket of government controls,” which, in itself, would be “entirely foreign to American democratic concepts.” SCAP HISTORY, supra note 4, at 5. As a result, “the Edwards Report became a broad policy document rather than a blueprint for Japan’s economic recovery.” Id. For further discussion of reactions to the Edwards Report, see HADLEY, supra note 6, at 125-30.


language. Also, the entire Occupation effort was designed to be conducted through existing Japanese governmental structures and was generally thinly staffed on the U.S. side. Thus, it is not surprising that the drafting process for antitrust legislation did not receive widespread attention within SCAP.

Analogizing the drafting process for Japan’s antitrust law to the drafting process for U.S. legislation, what had occurred to this point was akin to general debates over policy that might take place on the floor of Congress. Just as the framers of the Sherman Act had a general idea of what “antitrust” was to them (i.e., a mixture of political and economic theory of uncertain consistency) so, too, did those responsible for the idea of antitrust legislation have an overall sense of what “antitrust” might mean in Japan’s statute.

If the general approaches for the legislation were clear, the details remained unresolved. But these, as any lobbyist knows, are critical.

B. The First Drafts

The first serious effort at drafting Japan’s antitrust law was undertaken on the U.S. side by Posey T. Kime, an attorney who had been with the Antitrust Division of the Department of Justice. Kime’s drafts were a faithful attempt to translate the Edwards Report’s recommendations into specific language. Central to this faithfulness was heeding the Edwards Report’s view that U.S. antitrust law would not be an adequate model for Japan. Indeed, whatever might be said of these drafts, they were not simply a copy of U.S. law.

Kime’s first draft begins with a “Statement of Objectives” that is a marvelous combination of Learned Hand and Lord Acton.

160 See, e.g., COHEN, REMAKING JAPAN, supra note 137, at 192-93.

161 Kime was the Chief of the Antitrust Legislation Branch, Economic and Scientific Section, Antitrust and Cartels Division, of SCAP. Kime is referred to in Japanese sources as “Judge” Kime. Indeed, he was a judge on the Indiana Court of Appeals for two consecutive four-year terms (from 1931 to 1938). A Democrat close to Senator Sherman Minton, he subsequently went to the U.S. State Department and later to the Department of Justice Antitrust Division. Memorandum from Craig Abruzzo to Author 2 (Jan. 18, 1992) (on file with author); Conference Memorandum from Lester Salwin, Discussion with Byron Woodside and Walter Hutchinson of the Deconcentration Review Board 1 (July 30, 1948) [hereinafter Conference Memorandum], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (B)-12067 (discussing members of Antitrust Division who had been in the Antitrust and Cartels Division).

162 Two similar, but not identical, drafts were found in SCAP records, both titled “An Act to Promote and Preserve Free Trade and Fair Competition.” Only one draft has a date or indication of authorship, containing the marginal notation “Kime, 8/6/46.” The named draft is somewhat shorter than the other (although it has the same number of sections) and is stylistically more refined.

163 See supra notes 114-117 and accompanying text.
Believing that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone; [that] power tends to corrupt and absolute power corrupts absolutely.\textsuperscript{164}

The final Kime draft ("Kime Draft"), however, states the legislation's objectives quite differently:

[T]o promote conditions of economic progress and development; expansion of production, distribution, and trade in business and commercial transactions; equitable access to markets and raw materials; the maintenance of high levels of employment and national real income; and to curb . . . restrictive business practices; . . . in order that trade, industry or commerce may be free to organize itself into independent units which may effectively compete with each other to the end that the public will be more economically served and protected from subversive or coercive influences of monopolistic endeavor.\textsuperscript{165}

The Kime Draft then proceeds to prohibit various kinds of anticompetitive conduct, beginning with the practices specifically mentioned in the Edwards Report and then elaborating on them further.\textsuperscript{166} This effort at codifying antitrust carries out the Edwards Report's recommendation that "vague phrases" not be relied on for legislation in Japan.

A comparison between the conduct provisions of the Kime Draft and U.S. law at that time are set out in Table 1.

\textsuperscript{164} National Diet Library Microforms, \textit{supra} note 47, Sheet ESS (C)-10601. \textit{See} United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945); Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887). ("Power tends to corrupt and absolute power corrupts absolutely.")

\textsuperscript{165} Final Kime Draft 1-2 [hereinafter Kime Draft], \textit{microformed on} National Diet Library Microforms, \textit{supra} note 47, Sheet ESS (A)-03406.

\textsuperscript{166} \textit{See supra} notes 118-122 and accompanying text.
Table 1. Kime Draft, Conduct Provisions: Comparison to U.S. Law

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Coverage</th>
<th>Similarity to U.S. Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Agreements in Restraint of Trade; Criminal violations</td>
<td>Virtual copy of Section 1 of the Sherman Act</td>
</tr>
<tr>
<td>7</td>
<td>Prohibitions on Joint Action</td>
<td>No similar statutory provision</td>
</tr>
<tr>
<td></td>
<td>Long list of specific practices as &quot;illegal per se,&quot; e.g., price fixing; output restrictions; territorial allocations; restricting adoption of new technology; exclusion from access to markets, customers, or suppliers; basing point pricing systems; boycotts; and tying</td>
<td>Many practices covered by case law, although whether they are illegal per se is not clear for most of the practices listed(^{167})</td>
</tr>
<tr>
<td></td>
<td>Lists specific practices as illegal if they &quot;burden or adversely affect trade,&quot; e.g., standardization; collecting and circulating statistics; patent practices (agreements not to contest, agreements in excess of patent rights, cross-licensing future patents); common sales agencies; and orderly marketing agreements</td>
<td>Lists practices similar to many condemned in U.S. case law, under an apparent rule of reason standard(^{168})</td>
</tr>
<tr>
<td>8</td>
<td>Prohibits intimidation of competitor's customers; interfering with supply sources; and activities to &quot;coerce conformity&quot; to policies that reduce competition</td>
<td>No clear parallel provision</td>
</tr>
</tbody>
</table>

\(^{167}\) The clearest per se violations were price-fixing and output restraints. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). For territorial allocations, see United States v. Addyston Pipe & Steel Co., 85 Fed. 270 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). The Supreme Court treated boycotts in a "per se fashion," although boycotts were not held per se unlawful. See Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941). The Court's position on basing point systems and tying was not clear. Before 1948, basing point pricing was not considered unlawful. See Cement Manufacturers Protective Ass'n v. United States, 268 U.S. 588 (1925). But cf. Federal Trade Comm'n v. Cement Institute, 333 U.S. 683 (1948) (condemning basing point pricing under §5 of the FTC Act; evidence suggested agreement among competitors). In addition, the Court's strong condemnation of tying in the patent context was not handed down until 1947. See International Salt v. United States, 332 U.S. 392 (1947) (tying patented articles to patented machine).

\(^{168}\) See, e.g., American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (elaborate system of information exchange by members of the American Hardwood Manufacturers Association was unreasonable). But see Appalachian Coals v. United States, 288 U.S. 344 (1933) (appointment of common sales agent not unreasonable); Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925) (exchange of price data not unreasonable). Although the courts had condemned the use of a number of patent practices for extending the patent monopoly beyond its terms, it was unclear at the time whether practices such as agreements not to contest a patent or cross-licensing agreements were illegal by themselves. See United States v. National Lead Co., 63 F. Supp. 513, 523-24 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947) (finding illegal a patent pool under which defendants and foreign corporations exchanged patent application information to obtain identical patents, cross-licensed each other under such patents, and divided the world into trade territories with respect to commerce in titanium compounds). See also Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 456 (1940) (not unreasonable for patent holder to restrict its licensee's sales to a given territory even if the patent holder and the licensee are competitors, unless it enlarged the monopoly beyond the patent's scope). It was not until 1963 that the Supreme Court found an agreement not to contest patent rights, standing alone, to be a violation of the Sherman Act. See United States v. Singer, 374 U.S. 174 (1963).
Coverage Similarity to U.S. Law

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Coverage</th>
<th>Similarity to U.S. Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Prohibits discriminatory pricing, or predatory price cutting &quot;for the purpose of reducing competition&quot;</td>
<td>Section 2 of the Clayton Act bans discriminatory pricing that adversely affects competitors or competition</td>
</tr>
<tr>
<td>9</td>
<td>Prohibits unfair methods of competition (undefined)</td>
<td>Similar to Section 5 of the Federal Trade Commission Act</td>
</tr>
<tr>
<td>10</td>
<td>Prohibits exclusive dealing and tying with anticompetitive effect</td>
<td>Very similar to Section 3 of the Clayton Act</td>
</tr>
<tr>
<td></td>
<td>Prohibits rebates or discounts granted to achieve the same effect as an exclusive dealing or tying agreement</td>
<td>Same</td>
</tr>
<tr>
<td>11</td>
<td>Abolishes control associations</td>
<td>No comparable provision</td>
</tr>
</tbody>
</table>

One of the areas of greatest concern to the United States was the participation of Japanese companies in international cartels and restrictive international agreements; the need to ban such conduct was specifically mentioned in MacArthur’s directive.169 The provisions of the Kime Draft dealing with international agreements, and a comparison to U.S. law at that time, are set out in Table 2.

Table 2. Kime Draft, International Provisions: Comparison to U.S. Law

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Coverage</th>
<th>Similarity to U.S. Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>Contracts with foreign companies: Requires a filing with the government and a finding of conformity with the Act</td>
<td>No comparable provision</td>
</tr>
<tr>
<td>18</td>
<td>Import and export companies: existing companies abolished; no future companies can be formed “for the sole purpose of engaging in the importing or exporting trade”</td>
<td>Export cartels exempt from antitrust laws under certain circumstances170</td>
</tr>
<tr>
<td>18</td>
<td>Import or export trade: Makes illegal unfair methods of competition and “any unfair acts in the importation or exportation of goods”</td>
<td>Sherman, Clayton, and Federal Trade Commission Acts apply to U.S. export trade and to conduct abroad that affects U.S. foreign or interstate commerce171</td>
</tr>
</tbody>
</table>

The most radical provisions of the Kime Draft, from the perspective of U.S. law, were the structural provisions, set out in Table 3.

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169 See supra note 148 and accompanying text.
171 See United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945).
Table 3. Kime Draft, Structural Provisions: Comparison to U.S. Law

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Coverage</th>
<th>Similarity to U.S. Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Monopolization and Attempted Monopolization; Criminal Violation</td>
<td>Virtual copy of Section 2 of the Sherman Act</td>
</tr>
<tr>
<td>4</td>
<td>Substantial disparities in bargaining power:</td>
<td>No similar provision</td>
</tr>
<tr>
<td></td>
<td>prohibited because “indicative of the potential ability to monopolize”</td>
<td>No similar provision</td>
</tr>
<tr>
<td></td>
<td>unless “justified by positive technological advantage”</td>
<td>No similar provision</td>
</tr>
<tr>
<td></td>
<td>After hearing, could be permitted, regulated, or eliminated</td>
<td>No similar provision</td>
</tr>
<tr>
<td>6</td>
<td>Stock or asset acquisitions are banned, except for share acquisitions</td>
<td>Similar to Public Utility Holding Company Act (applicable only to companies in power</td>
</tr>
<tr>
<td></td>
<td>“in a closely related field of activity” when approved by the government</td>
<td>industry)</td>
</tr>
<tr>
<td></td>
<td>Mergers or amalgamations of competitors are</td>
<td>Far stricter than Section 7 of the Clayton Act; closest analogue,</td>
</tr>
<tr>
<td></td>
<td>banned; noncompeting companies could merge after a government finding</td>
<td>Interstate Commerce Act, which requires ICC finding that a railroad merger is in the</td>
</tr>
<tr>
<td></td>
<td>that the merger is in the “public interest”</td>
<td>“public interest”</td>
</tr>
<tr>
<td></td>
<td>Limit on firm size to ¥50 million unless government finds that additional</td>
<td>No similar provision</td>
</tr>
<tr>
<td></td>
<td>capital will not tend toward monopoly, give the company</td>
<td></td>
</tr>
<tr>
<td></td>
<td>substantial disparity in bargaining power, “or otherwise result in a</td>
<td></td>
</tr>
<tr>
<td></td>
<td>lessening of competition”</td>
<td></td>
</tr>
</tbody>
</table>

Two structural provisions in the Kime Draft warrant particular comment. The first is Section 4’s prohibition on “substantial disparities of bargaining power.” This concept, as used in the Edwards Report, attempts to go beyond then-current economic and legal concerns with monopoly market positions and deal with the conglomerate industrial structure of Japan. The Edwards Mission saw these “disparities” as indicative of how large firms with multi-market presence could use their power strategically across markets to suppress competition.

The Kime Draft loses this critical distinction. Instead, the Kime Draft links “substantial disparities of bargaining power” to monopoly, stating that such disparities are condemned because they are “indicative of the potential ability to monopolize.” The provision thus becomes one aimed more at structural monopoly than at structural oligopoly.

The second critical structural provision in the Kime Draft is the absolute yen limit on the size of Japanese corporations. The Edwards Report had advised against this type of limit because of concerns that economies of scale and scope would dictate that firms in different industries have different
optimum sizes. The Kime Draft, however, seeks a sharper line, albeit one that could be breached if the enforcement agency finds that the increase in size would not “lessen competition.”

These differences between the Kime Draft and the Edwards Report likely reflect the different professional expertise of their drafters. The Edwards Report was written by an economist who understood that monopoly and oligopoly problems may be different. The Kime Draft, however, was written by a lawyer formerly with the Antitrust Division of the Department of Justice. It reflects a fine understanding of the state of the law, right up to Learned Hand’s near-structural monopoly decision in *Alcoa*, but is less well attuned to economic concerns.

The legal perspective of the Kime Draft, however, turns out to have been useful in drafting the enforcement and institutional provisions. The Kime Draft’s provisions on these issues are far more articulated than the vague suggestions of the Edwards Report.\(^{172}\)

**Table 4. Kime Draft, Enforcement and Institutional Provisions: Comparison to U.S. Law**

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Coverage</th>
<th>Similarity to U.S. Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
<td>Treble-damages plus attorneys’ fees</td>
<td>Virtual copy of Section 4 of the Clayton Act</td>
</tr>
<tr>
<td></td>
<td>Attorneys’ fees to be 1/4 to 1/3 of recovery, if recovery exceeds ¥20,000</td>
<td>No similar provision</td>
</tr>
<tr>
<td>15</td>
<td>Criminal penalties for violation of any provision of the Act: minimum prison term, one year; maximum prison term, three years; plus a fine of ¥25,000 to ¥50,000; none of which can be suspended</td>
<td>Sherman Act criminal penalties are weaker (one year maximum; jail and fine are alternative and not compulsory)</td>
</tr>
<tr>
<td></td>
<td>Liability for those who “authorized, ordered, advised in favor of, had knowledge of, or by virtue of the position held should have had knowledge”</td>
<td>Broader formulation than current antitrust law(^{173})</td>
</tr>
</tbody>
</table>

\(^{172}\) *See supra* notes 133-136 and accompanying text.

### Sec. Coverage Similarity to U.S. Law

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Broad array of additional penalties, e.g., suspending a violator’s right to engage in business or dispose of assets for six months to three years, mandatory three year ban on bidding for government contracts, forfeiture of patents and copyrights for illegal licensing restrictions, and forfeiture of corporate charter when required in the public interest(^{174})</td>
</tr>
<tr>
<td>18</td>
<td>Enforcement: Fair Practice Triumvirate (Vice Minister of Justice and two Assistant Ministers), with extensive investigatory powers&lt;br&gt;Vice Minister to proceed first against criminal violations&lt;br&gt;Vice Minister nominated by Prime Minister and confirmed by House of Councilors; term of office continues so long as he is physically able or until age 65&lt;br&gt;Antitrust and Fair Trade Practices Court composed of three life tenure justices; exclusive jurisdiction over all cases arising under the Act</td>
</tr>
</tbody>
</table>

### C. Japan’s Response

The standard view in Japan of the origins of Japan’s Antimonopoly Act is that there is a straight line from the Kime Draft to the bill that the Diet enacted and that drafting of the final legislation “proceeded quickly based on [the] Kime bill.”\(^{175}\) The subtext of the standard view is that those responsible for the legislation on the Japan side were faced with something so foreign that they could not even understand the concepts well enough to translate the bill properly.\(^{176}\) Weaving these two strands together yields the idea that antitrust law is a U.S. imposition, one so foreign to Japan as to be useless.

\(^{174}\) The section also provides that foreign corporations violating the law in Japan would be prohibited from doing business in Japan for up to 10 years.

\(^{175}\) SHODA & SANEKATA, supra note 155, at 32.

\(^{176}\) Chalmers Johnson reports that the person at the Ministry of Commerce and Industry who was asked to translate into legal Japanese the draft that General MacArthur’s headquarters had sent over (presumably, the Kime Draft) was embarrassed to admit to his superior that he did not understand what he was translating. His superior “got the drift of the law only by looking at the original English text.” JOHNSON, supra note 41, at 175.
There is no straight line from the Kime Draft to the Diet. The process of legislative drafting was much more complicated than the standard view would indicate and the resulting legislation is much more made by Japan than the standard view would have us believe.

The U.S. side submitted the Kime Draft to the Japan side in August 1946. In September 1946, Japan's government sent a reply memorandum to Kime, titled “Japanese Government’s Views on the Suggested Legislation Relating to Economic Order” (“September Memorandum”). After first noting that Japan’s government had drafted an “Industrial Order Law” and submitted it to General Headquarters “some time ago,” and stating that it had “no objection in substance to the Act suggested by your Headquarters,” the September Memorandum continues:

[T]he various provisions suggested in the Act are of so sweeping a character as to be unparalleled even in the countries like the United States with a highly developed economy. Frankly, the Japanese government fears [that] strict application of these regulations in Japan whose economy is still undeveloped and which moreover is struggling to recover . . . might not only defeat the ultimate objectives of the proposed legislation . . . but also produce results inimical to public interest.

Repeating the views of the SSC Report, the September Memorandum states, “Even in years that follow, Japan whose resources are so meager in proportion to its population will find it necessary to regulate economic activity in many ways in order to prevent waste of resources . . . .”

The September Memorandum’s specific objections begin with the Kime Draft’s institutional provisions. The Memorandum takes issue with

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177 See “Check Sheet,” from ESS to Govt. Section 1 (Jan. 28, 1947), microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09598. Prior to its submission to Japan’s government, the draft was approved by interested divisions within the Economic and Scientific Section and submitted to the Government Section for comment; it was presented to Japan’s government as “embodying generally SCAP’s views on appropriate [antitrust] legislation.” Id.


179 September Memorandum, supra note 178.
the basic concept that antitrust should be developed in the “common law” way, through the building up of judicial precedent. This is not suitable for a country like Japan, the Memorandum argues, “which has long been accustomed to minute and detailed laws and regulations [as is found] under the continental system.”

The September Memorandum suggests a different institutional approach. The responsible agency should not be independent of the executive or judiciary, but should be under the supervision of the Prime Minister. This agency would then order the competent ministry to carry out its enforcement decisions. Objecting parties (including the ministry that had received the order) would be able to resort to the courts. Criminal cases would not be handled by the agency, but would be referred to the Procurator’s Office.

The September Memorandum also makes specific objections to the Kime Draft’s conduct and structural rules. Regarding the conduct rules, the Memorandum argues that the provision banning price discrimination fails to account for differences in price “according to quality, volume, cost, etc.” It also requests an exemption for control associations operating “under national policy on proper grounds.” This is consistent with the view of the SSC that control associations should continue.

Japan’s government objected more strongly to the structural provisions. The September Memorandum takes issue with the provision on substantial disparities in bargaining power, arguing that the provision appears to “punish enterprise” merely because such disparities exist. It argues for relaxing the Kime Draft’s strict prohibitions on stock ownership (ownership of less than five percent of another company should be permitted), assets acquisitions (only those “liable to lead to monopolization” should be forbidden), and mergers among competitors (they should be permitted where the commission finds them “to be in keeping with public welfare”). Most critically, the September Memorandum asserts that the proposed restrictions on the size of a company should be deleted: “[T]he expansion of an enterprise is not an evil in itself.”

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180 Id. at 2.
181 Note that the Kime Draft had provided that the minister in charge of the antitrust enforcement agency would be appointed by the Prime Minister, but the term of the appointment was not thereafter dependent on the continued approval of the Prime Minister. See supra Table 4, sec. 18.
182 See September Memorandum, supra note 178, at 2-3.
183 Id. at 6.
184 Id. See also supra note 95 and accompanying text.
185 September Memorandum, supra note 178, at 5.
186 Id.
187 Id. at 6.
The September Memorandum then informs SCAP of what steps Japan’s government was willing to take toward preparing an antitrust bill. The government would establish an “Economic Order Preparatory Commission,” which would investigate and prepare suitable legislation. “It is thought . . . that the legislation for Japan’s future economic order may well be considered after two or three years.”

Thus, as of the beginning of October 1946, Japan’s government had rejected the Kime Draft as “unacceptable.” It had set out specific areas in which it disagreed with the approaches advanced by the United States and apparently hoped to postpone the matter for at least two years.

D. The Outline

Posey Kime left Japan in October 1946, shortly after receiving Japan’s negative response to his draft. The task of drafting antitrust legislation fell to his successor, Lester Salwin, who was not an antitrust lawyer.

In December of 1946, one week after Salwin took over, Japan’s government advanced a new proposal. First, the government indicated that an “Investigation Committee on Anti-Trust Legislation” (“Investigation Committee”) would be established. Salwin was informed that the Cabinet had already requested nine named Diet members to be on this committee. A group of eight named advisors, one of whom had also been a member of the Special Survey Committee, would be assisting these members. Government officials concerned with the antitrust problem would serve as secretaries to the Investigation Committee.

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188 Id. at 2.
189 Salwin Memorandum, supra note 178.
190 Salwin became Chief of the Antitrust Legislation Branch, Economic and Scientific Section, Antitrust and Cartels Division, effective December 4, 1946. See id.
191 See Memorandum from Makoto Hashii, Cabinet Secretary, The Investigation Committee on Anti-Trust Legislation 1 (Dec. 11, 1946) [hereinafter Investigation Committee Memorandum], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09598.
192 The member overlapping with the Special Survey Committee was Yoshitaro Wakimura, Professor of Economics at Tokio Imperial University. See id. at 2; SSC REPORT, supra note 33, at 5. Wakimura was also a member of the Holding Company Liquidation Commission (“HCLC”), which had been established by Japan’s government to administer the zaibatsu dissolution plan. See HADLEY, supra note 6, at 68-69. The other advisors included the Chairman of the HCLC, a professor of law, the managing director of Chichibu Cement Company, a director of the Nippon Steel Manufacturing Company, a director of the Osaka Industry Association, a director of the Agricultural Association, and a vice president of Nippon Bank.
193 See Investigation Committee Memorandum, supra note 191, at 2-3.
Second, the government gave Salwin an Outline of the Antitrust Law ("Outline"), which had been drawn up by the government and would be submitted to the Investigation Committee as the basis for its deliberations. The plan now advanced by Japan's government was for the Committee to draft a bill on which the Committee would hold public hearings. The bill would be subject to SCAP approval. The government would then propose the bill to the Diet.

The Outline is a serious, if preliminary, effort by Japan to go beyond criticism and propose specific statutory provisions. Naturally, it takes the provisions in the Kime Draft as a starting point, but the Outline also shows the independent views of Japan's government. An examination of the areas in which the Outline agrees with and differs from the Kime Draft thus provides insight into the different ways that the two sides viewed antitrust legislation.

These differences are apparent at the very beginning of the two proposals. Each begins by articulating the objectives of antitrust legislation. The Kime Draft states that the objectives of the antitrust law are to assure "that trade, industry or commerce may be free to organize itself into independent units which may effectively compete with each other to the end that the public will be more economically served and protected from subversive or coercive influences of monopolistic endeavor." This statement reflects the view of antitrust law as legalistic regulation—business firms have a right to be "free" to compete and the public is to be "protected" from the wrongs committed by monopoly enterprise.

Japan's Outline, on the other hand, states that the objective of the antitrust law is to establish "the foundation for the stabilization and progress of [the] national economy, and also [the] protection of the interests of the ultimate consumer." The Outline thus distinguishes between national economic welfare and consumer interest, and it places national economic welfare first. This is consistent with the economic objectives of Japan's government, and it is consistent with the role that regulatory law plays in Japan. Antitrust is economic policy, not a grant of rights. Table 5 compares the conduct provisions of the Outline and the Kime Draft.

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194 Outline of the Antitrust Law [hereinafter Outline], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-06598.
195 See id.
196 Kime Draft, supra note 165.
197 Outline, supra note 194 (emphasis added).
198 Provisions in Tables 5, 6, and 7 are found in the National Diet Library Microforms, supra note 47, Sheet ESS (C)-06598.
Table 5 shows a high degree of agreement between the United States and Japan on a variety of practices which, in one way or another, the Outline characterizes as "unfair." The Outline is thorough in its inclusion of prohibitions not only on core cartel behavior (e.g., price-fixing and market allocations), but also on a wide range of exclusionary practices. This is consistent with the willingness shown in the SSC Report to democratize markets and insure that they are open to all. Table 5 also shows a distinct disagreement, however, between the two sides over the per se/rule of reason issue. The restraints on the Kime Draft's per se list are no longer absolutely condemned, but instead are prohibited only if "unreasonable." Further, the list of "rule of reason" practices from the Kime Draft is gone.\(^{199}\) It will never return.

**Table 5. Conduct Provisions: Comparison Between Outline and Kime Draft**

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Coverage of Outline</th>
<th>Kime Draft (§)</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Prohibits &quot;unreasonable restraints of trade&quot; that will &quot;lead to the obstruction of fair competition&quot;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Unreasonable restraints include: price-fixing; allocation of output or markets; boycotts; allocation of transportation routes; &quot;exclusion or restriction of specially designated enterprises from the market&quot;; and &quot;restriction on the adoption of new technology or other technological restrictions&quot;</td>
<td>Does not use this phrase</td>
</tr>
<tr>
<td>5</td>
<td>Prohibits &quot;unfair competition&quot;</td>
<td>&quot;Unfair competition&quot; is undefined (§9)</td>
</tr>
<tr>
<td></td>
<td>Specifically prohibits: &quot;intimidation, or coercion, of the customers of a competitor&quot;; dumping; &quot;interfering with a competitor's sources of supply or credit&quot;; setting prices or rebates based on exclusive dealing that are &quot;liable to substantially lessen competition, or tend to create a monopoly&quot;; and misbranding or misrepresentation of trademark</td>
<td>Nearly identical provision makes intimidation and coercion illegal; prohibits similar practices, such as &quot;predatory pricing&quot; but does not use the term &quot;dumping&quot; (§8) or include the trademark provision</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Nearly identical provision on exclusive dealing (§5)</td>
</tr>
</tbody>
</table>

There are also two important areas involving cartel practices where the Outline and the Kime Draft diverge sharply. The Kime Draft specifically

\(^{199}\) *See supra* Table 1, sec. 7.
prohibits the control associations that had become ubiquitous during the war years. The Outline, however, makes no mention of these associations. The Kime Draft also includes extensive provisions restricting export ventures and unfair competitive acts in import or export trade. By contrast, the Outline, in Section 6, specifically provides that the antitrust law would not apply to foreign trade. It is probably not surprising that the Outline is consistent with the views of the SSC Report on these issues. The SSC Report argued for the continuation of control associations and for Japan's return to international markets. Table 6 compares the structural provisions of the Outline and the Kime Draft.

Table 6. Structural Provisions: Comparison Between Outline and Kime Draft

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Coverage of Outline</th>
<th>Kime Draft ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Prohibition of “Unreasonable Monopolization”</td>
<td>Monopolization illegal; no mention of “reasonableness” (§2)</td>
</tr>
<tr>
<td></td>
<td>“No person shall concentrate possession or control in any one line or branch of business in such manner as will limit equal opportunity for free development of enterprises, and shall thereby hinder the promotion of public welfare through free business transactions.”</td>
<td>Uses Sherman Act language</td>
</tr>
<tr>
<td>3</td>
<td>Prohibition of Matters Liable to Lead to Unreasonable Monopolization: Substantial disparities of bargaining power among competitors</td>
<td>Very similar provision (§4)</td>
</tr>
<tr>
<td></td>
<td>Enforcement agency to take “necessary action to eliminate such disparities” where “undesirable in the public interest”</td>
<td>Similar vague enforcement mechanism, but disparities could be justified “by positive technological advantage”</td>
</tr>
<tr>
<td>3</td>
<td>Mergers, amalgamations, or asset acquisitions of mutually competitive corporations or other juridical persons prohibited where liable to lead to unreasonable monopolization</td>
<td>Much more restrictive provisions (e.g., mergers between competitors banned) (§6)</td>
</tr>
<tr>
<td>3</td>
<td>“Octopus firms”[^203] Where the operation by any corporation or other juridical person above a specified scope of technologically unrelated enterprises is liable to lead to unreasonable monopolization, such operation shall be prohibited</td>
<td>Absolute limit on firm size, unless there is a finding that additional capital will not tend toward monopoly, give substantial disparity in bargaining power, or otherwise lessen competition (§6)</td>
</tr>
</tbody>
</table>

[^200]: See supra Table 1, sec. 11.
[^201]: See supra Table 2.
[^202]: See supra notes 89-96 and accompanying text.
[^203]: This appears as a marginal notation to explain this section.
The structural provisions in the Outline indicate a modest acceptance of the positions taken in the Kime Draft. In contrast to the position taken in the September Memorandum, the Outline accepts some limit on firm size, although it is unclear what that limit was to be. The idea of prohibiting "disparities in bargaining power" is also accepted, although, again, the contours of relief are vague. Lastly, the Outline adopts some prohibitions on mergers and monopoly.

What is most interesting about the structural provisions, however, is the sense they provide of how the Japan side understood the concepts in the Kime Draft. First, monopolization is not articulated in clear structural terms, that is, as a ban related to high market share. Rather, the Outline defines "monopolization" in terms of exclusionary power (defined as the ability to "limit equal opportunity for free development of enterprises"), which arises out of a "concentration" of control. The analytical lack of clarity regarding market share shows, again, the lack of distinction drawn on the Japan side between classical monopoly and oligopoly (or, perhaps, between large market share and large firm size). Thus, as these concepts are woven into the law it becomes apparent that Japan's law will not draw a careful distinction between the two situations. Whatever the economic wisdom of this lack of clarity, it will affect subsequent versions and interpretations of these provisions.

Second, the reason given in the Outline for banning "substantial disparities in bargaining power" is that they are "liable" to lead to monopolization. On the surface this is consistent with the Kime Draft, but it is inconsistent with the original basis for the idea in the Edwards Report. The Edwards Report had advanced this proposal out of concern with the zaibatsu's strategic abilities to exclude competitors and control the competitive efforts of independent enterprises. Given the Outline's view of "monopolization," however, it may be that Japan's government saw the competition problem exactly as the Edwards Report did, that is, as a problem of exclusionary conduct rather than a problem of price-raising power. Indeed, Japan's structural proposals may have been presented in a way that was more consistent with Edwards' vision than the Kime Draft's proposals. Perhaps most interesting in this regard is the Outline's reference to "octopus firms," a graphic description of the zaibatsu and one which focuses not on market share but on the zaibatsu's all-encompassing reach.

The final critical area is enforcement. Table 7 compares the enforcement and institutional provisions of the Outline and the Kime Draft.

204 Cf. supra note 85 and accompanying text.
Most significantly, the Outline continues to express opposition to an independent enforcement agency which was voiced in Japan’s September Memorandum. The Outline makes a further change to the proposed organization of an enforcement agency, however. The September Memorandum proposes that the agency be responsible to the Prime Minister and issue orders to other relevant Ministries. In contrast, the Outline places the “Antitrust Committee” within the Ministry of Justice, a more subordinate position.

E. Understanding U.S. Antitrust Law

Although the Outline shows substantial agreement with many of the concepts proposed in the Kime Draft, it did not please the United States. In Salwin’s view, the Outline “was not only incomplete but weak and rudimentary in substance and scope.”

On December 14, 1946, two days after Salwin received the Outline and Japan’s proposed course of action, the Investigation Committee held its first meeting (with the Prime Minister at his official residence). SCAP’s disapproval of the Outline was conveyed at the meeting. Also presented to the Committee was the Kime Draft (of course, the government of Japan

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205 Salwin Memorandum, supra note 178, at 2.
already had this draft), characterized as “embodying generally SCAP’s views on antitrust policies and principles.”

Two days later Japan’s negotiators (one was from the Economic Stabilization Board and the other was the Secretary of the Cabinet Legislative Office) met with Salwin. They requested that SCAP give its “concrete opinion” as to the defects in Japan’s proposal. This Salwin declined to do. Instead, he recommended that the Investigation Committee study both its own Outline and the SCAP bill and “work up its own views as to the provisions of a proper law, submit them for SCAP approval, and furnish SCAP such comments as would be helpful in determining whether public hearings should be held.”

At this meeting Japan’s negotiators also gave Salwin a memorandum titled “Questions Pertaining to the Interpretation of Anti-Trust Laws” (“Questions Pertaining Memorandum”). Unlike the memorandum submitted by Japan’s government in September, which had criticized the coverage of the Kime Draft from an economic policy point of view, this memorandum showed an effort to obtain an understanding of U.S. antitrust law and how its provisions might be reflected in an antitrust law in Japan. The Questions Pertaining Memorandum begins by parsing the relationship between Sections 1 and 2 of the Sherman Act, an interpretive problem that has caused some difficulty for U.S. courts. The Memorandum views “restraint of trade” as “the status, in which free competition is eliminated” and interprets monopoly as “an expression pointing to an economic unit, on which is concentrated the economic controlling power.” The two provisions, it suggests, “are in a logical relation of cause and effect.”

This left a third broad category of violation under U.S. law, unfair methods of competition, covered by Section 5 of the Federal Trade Commission Act. The Questions Pertaining Memorandum suggests that

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206 See Memorandum from Lester Salwin, Conference held Dec. 16, 1946, with Mr. Hashimoto, Economic Stabilization Board, and Mr. Murakomi, Cabinet Legislative Office (Dec. 18, 1946) [hereinafter Memorandum of Conference, Dec. 16, 1946], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09598.

207 Id.

208 Memorandum, Questions Pertaining to the Interpretation of Anti-Trust Laws (n.d.) (including handwritten note by Lester Salwin that a memorandum was submitted by Mr. Murakomi, Cabinet Legislative Office, on Dec. 16, 1946) [hereinafter Questions Pertaining Memorandum], microformed on National Diet Library Microforms, supra note 47, Sheet EES (C)-09598.

209 The first effort by the Supreme Court to explicate the relation between Sections 1 and 2 came in Standard Oil v. United States, 221 U.S. 1 (1911).

210 Questions Pertaining Memorandum, supra note 208, at 1.

211 Id.
there are two categories of unfair methods of competition. The first covers practices which are designed to bring about a monopoly or a restraint of trade, but fail. These practices "generally [tend] to lessen competition by resorting to weapons other than superior quality or cheaper price of services or commodities"\(^{212}\) (what we might today call exclusionary practices). The second category covers methods of competition that adversely affect "particular customers or competitors, apart from substantially lessening competition."\(^{213}\) Citing a Brookings Institute study, *Government and Economic Life*, the Questions Pertaining Memorandum states that this second category of unfair methods of competition relates to "the intended maintenance of certain ethical standard[s] in the business world."\(^{214}\) Because including such practices in the antitrust law would create "duplication with the criminal controlling regulations" of other laws in Japan (such as fraud), the Memorandum suggests limiting the definition of unfair methods of competition to those practices in the first category.\(^{215}\) "Unfair methods of competition," the Memorandum argues, should not include methods that adversely affect "particular customers or competitors, apart from substantially lessening competition."\(^{216}\)

The Questions Pertaining Memorandum then proceeds to discuss provisions relating to price discrimination, tying, and exclusive dealing. The Memorandum notes that at one time during the Clayton Act's legislative drafting process, these provisions had been removed from the bill on the ground that they were "unfair methods of competition" and so were redundant with the pending Federal Trade Commission Act. These provisions, however, were subsequently reinserted into the Clayton Act as Sections 2 and 3. The Memorandum also notes that the Sherman and Clayton Acts, both of which cover these practices, require some proof of impact on competition, whereas Section 5 of the Federal Trade Commission Act does not. Because the Kime Draft has the same redundant and inconsistent coverage, the memorandum inquires as to the intended distinction between "unfair methods of competition" and the specific provisions in the Kime Draft covering this type of conduct.\(^{217}\)

The Questions Pertaining Memorandum concludes with questions about enforcement. It first inquires into the relation between equity and

\(^{212}\) Id. at 3.
\(^{213}\) Id.
\(^{214}\) Id.
\(^{215}\) Id. at 4.
\(^{216}\) Id. at 2-3.
\(^{217}\) See id.
common law jurisdiction to enforce antitrust legislation, specifically asking whether violations of both the Sherman and Clayton Acts are proceeded against simultaneously under both statutes. With regard to criminal penalties, the Memorandum argues that "account has to be taken of the special conditions of this country, where anything in the nature of morals outlawing trusts has been an utter stranger." The Memorandum concludes by suggesting that criminal and administrative enforcement be divided:

[V]iolators who have brought about the status of "restraint of trade" will be punished according to penal regulations after the pattern of those of the Sherman Act. Violators who acted for the purpose of creating the status of "restraint of trade" or "monopoly" but have not succeeded in bringing about the intended status (such as lowering [the] standard of commodities, raised prices, etc.) will be given [an] order to cease and desist from violations, by a certain administrative agency (for instance, the Anti-Monopoly Commission), and will be punished only when they fail to obey such an order.219

The Questions Pertaining Memorandum thus shows considerable sophistication in its understanding of U.S. antitrust law, even appreciating the distinction between protecting competition and protecting competitors.220 Equally significant, the Memorandum attempts to rationalize some of the apparent inconsistencies in U.S. antitrust law that arise from having three separate statutes enforced by two different kinds of enforcement agencies. These inconsistencies had been worked out to some degree by case law in the United States and were perhaps not apparent to Kime when he drafted the U.S. proposal. Putting all of U.S. antitrust law into one statute, however, created substantial interpretive problems. Presumably, logical inconsistencies and redundancy should not exist within the four corners of one statute. This was a problem that the U.S. side did not see, but the Japan side did.

The Questions Pertaining Memorandum thus indicates that Japan's problems in drafting an antitrust law had nothing to do with the idea that antitrust came from a culture so foreign to Japan that its concepts could

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218 Questions Pertaining Memorandum, supra note 208, at 7.
219 Id.
220 Chief Justice Warren had yet to write the classic line "It is competition, not competitors, which the [Clayton] Act protects." Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).
not be understood. Japan’s problems came from the fact that U.S. antitrust legislation, and its common law development, were not perfectly clear, and the Kime Draft only exacerbated the interpretive problems by putting all of U.S. antitrust law into one piece of legislation.

F. The Tentative Draft

There is no record of a written response to Japan’s questions, but on January 5, 1947, more than two weeks after the Questions Pertaining Memorandum was received, U.S. officials had a dinner meeting with officials from Japan’s Cabinet Legislative Office. Upset with the slowness of the process, the U.S. side emphasized “the seriousness of our purpose.” Salwin subsequently described the message he delivered. “In general, it was impressed upon them that it [antitrust legislation] was looked upon as an integral part of the economic deconcentration and democratization of Japan; that it was intended to be helpful and not hurtful to the Japanese economy in opening channels of trade and commerce to free competition.” Japan’s government, he reported, was afraid of “too literal an enforcement program”; the U.S. was afraid of “too weak or faithless a performance.”

The result of this prodding came one month later. The Japan side submitted the “Law Relating to Prohibition of Private Monopoly and Preservation of Lawful Trade (Tentative Draft)” (“Tentative Draft”), which was received by Salwin on February 4, 1947. This Tentative Draft, containing ninety-five articles, turns the concepts embodied in the Outline into an elaborated piece of legislation. It takes a major step toward the language that would finally be enacted into law. The extent to which significant language in the final legislation originated in the Tentative Draft, rather than in the Kime Draft, is shown in Table 8.

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221 Salwin Memorandum, supra note 178, at 2.
222 Id.
223 Id.
224 Law Relating to Prohibition of Private Monopoly and Preservation of Lawful Trade (Tentative Draft) [hereinafter Tentative Draft], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09597. The Tentative Draft itself is undated, but contains a handwritten notation of “4 Feb 47.”
Table 8. Comparison of Language of Tentative Draft, Kime Draft, and Final Legislation

<table>
<thead>
<tr>
<th>Language of Tentative Draft</th>
<th>Final Legislation</th>
<th>Kime Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coverage: law applies to &quot;entrepreneurs&quot;</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Monopolization: &quot;No entrepreneur shall in any manner resort to any activities which, by excluding or controlling, contrary to the public interest, the business activities of other entrepreneurs, have the effect of substantially restraining from any particular field of trade the business activities in general (such activities are hereinunder 'unreasonable monopolization')&quot;</td>
<td>(1) Yes: exclusion or control (2) Yes: public interest effect (3) Yes: proof of substantial effect on particular field of trade</td>
<td>(1) No (2) No (3) No</td>
</tr>
<tr>
<td>Unreasonable restraints of trade: contracts or agreements &quot;mutually restricting, contrary to the public interest,&quot; business activities, where the effect is &quot;substantially restraining from any particular field of trade the business activities in general&quot;</td>
<td>(1) Yes: public interest effect (2) Yes: substantial effect on field of trade</td>
<td>(1) No (2) No</td>
</tr>
<tr>
<td>Per se provision covers: agreements on price, output, sales; restrictions on &quot;technology, products or markets&quot;; restrictions on &quot;installation or expansion of equipment, or on adoption of new technology or production methods&quot;</td>
<td>Language virtually identical</td>
<td>Different language; much broader coverage</td>
</tr>
<tr>
<td>Substantial disparities of bargaining power: lists ten items to be considered in fashioning relief</td>
<td>Language and relief provisions virtually identical</td>
<td>Unelaborated</td>
</tr>
<tr>
<td>Unfair methods of competition: enumerates six types</td>
<td>Language virtually identical to six of the bill's seven enumerated unfair methods</td>
<td>Undefined; some practices covered in other sections</td>
</tr>
<tr>
<td>Enforcement agency and powers: 7 members, 5-year term; Commission to conduct investigations through summoning witnesses, examining books, conducting spot inspections</td>
<td>Composition of agency same; language regarding procedures virtually identical</td>
<td>Tenure guaranteed to retirement; no mention of spot inspections</td>
</tr>
</tbody>
</table>

As Table 8 indicates, the language of the major substantive provisions and the structure of the Antimonopoly Act will be closer to the language and structure drafted on the Japan side than the language from the U.S. side. Similarly, the content of some of the major substantive provisions is also more tailored to Japan's desires. The list of enumerated "per se" concerted
practices is shorter than the Kime Draft's list (no mention of boycotts, for example) and the "rule of reason" list from the Kime Draft is omitted (as it was in the Outline). The Tentative Draft also combines the separate Kime Draft provisions for exclusionary practices (such as predatory pricing, tying, and exclusive dealing) and for an undefined "unfair methods of competition" into one provision, which is clearly defined as unfair methods of competition.225 This is an apparent result of the analysis in the Questions Pertaining Memorandum, remedying the redundancy problem seen by the Japan side.

There are still some important substantive differences between the approach of the Tentative Draft and the Kime Draft. The Tentative Draft has no provision dealing explicitly with international trade, a significant omission in light of its clearly stated importance to the United States. Also, the Tentative Draft prohibits mergers and acquisitions only when "substantial disparities in bargaining power will arise."226 Although the Tentative Draft lists practices characterized as per se violations, it gives the enforcement agency, which the Tentative Draft calls the Antitrust Commission, the power to approve these practices (such as "stabilization of prices" or output restrictions) if the Commission finds them to be "in the public interest."227 Another clause in the Tentative Draft provides that "in so far as an entrepreneur operates his enterprise . . . in such manner as will conduce to the public welfare, this law shall not hinder his free activities."228 These latter provisions are a far remove from the Kime Draft and U.S. law.229 Their vagueness comports with Japan's desire to retain bureaucratic discretion, particularly in the area of cartel behavior, rather than create a

225 The Tentative Draft contained the following definition of unfair methods of competition, a definition that was not retained in the final legislation but which gives a sense of how the drafters viewed these practices: "No entrepreneur shall, for the purpose of unreasonably expanding his own business capacity, or unreasonably excluding or controlling the business activities of a competitor, resort as a means of competition to any of the methods enumerated below (called hereinafter 'unfair methods of competition')." Id. art. 14.
226 Id. arts. 9-12.
227 See id. art. 6.
228 Id. art. 3.
229 "Public interest" language, however, has often been used in U.S. regulatory legislation to give regulatory agencies authority to approve otherwise anticompetitive action. Indeed, the Antitrust Division had fought in the courts to confine that power. See McLean Trucking v. United States, 321 U.S. 67, 83 (1944) (rejecting Department of Justice argument that antitrust policies should be paramount in reviewing merger under public interest standard; antitrust policies determine the public interest "only in a qualified way").
system with clearly delineated offenses to which no exceptions could be made.\textsuperscript{230}

The Tentative Draft also makes three important changes from the Kime Draft in a critical enforcement area, the private action. First, consistent with the Outline, but not with the Kime Draft, damages are single, not treble.\textsuperscript{231} Second, the Tentative Draft states that there is no right to bring a claim in court until the Commission (or a court in a government action) renders a final decision that the entrepreneur has violated the law.\textsuperscript{232} Finally, the Tentative Draft provides a defense if the entrepreneur can prove that the "act was not done willfully nor any mistake committed."\textsuperscript{233} This intent requirement was consistent with the approach to tort claims under Japan's civil law, but not with the Kime Draft approach.

Of these three changes in the private action, only the intent defense later drew attention from the U.S. side. The switch to a narrowly confined single-damages claim, contingent on prior Antitrust Commission action, failed to attract comment and emerged unchanged in the final legislation.\textsuperscript{234} The failure to establish a viable private action would later help keep control of the development of antitrust law safely under bureaucratic control.\textsuperscript{235}

G. Negotiating the Tentative Draft

Although Salwin believed that the Tentative Draft was "a distinct improvement" over the Outline, nevertheless, he felt that it was still "entirely too limited in scope."\textsuperscript{236} At this point Japan's government assigned a new official to assist in legislative drafting, Kashiwagi from the Ministry of Finance. Kashiwagi had previously worked on legislation involving the disposal of securities and was considered by Salwin to be "eminently qualified" both by his experience and his command of English.\textsuperscript{237} Over the next two weeks there followed "almost daily conferences" dealing with the legislation. These conferences focused on the major points of difference

\textsuperscript{230} Although neither provision would survive in the final draft, the desire to give the Commission power to authorize some cartel exemptions would eventually be realized in the 1953 Amendments. See Antimonopoly Act, \textit{supra} note 4, arts. 22-23.

\textsuperscript{231} Tentative Draft, \textit{supra} note 224, art. 21.

\textsuperscript{232} See \textit{id.} art. 22.

\textsuperscript{233} See \textit{id.} art. 21.

\textsuperscript{234} The Tentative Draft also provides criminal penalties (two years and a ¥20,000 fine) for engaging in unfair methods of competition. See \textit{id.} art. 80. The criminal penalty for this section was subsequently dropped by the Japan side.

\textsuperscript{235} See Harry First, \textit{Antitrust Enforcement in Japan}, \textit{64 ANTITRUST L.J.} 137, 176-80 (1995).

\textsuperscript{236} Salwin Memorandum, \textit{supra} note 178, at 3.

\textsuperscript{237} See \textit{id.} at 4.
between what Salwin wanted and what Japan’s government was trying to achieve. There is no record of any direct reference to either the language or provisions of the Kime Draft at any time during these negotiations, although many of Salwin’s objections were consistent with the Kime Draft’s approach.238

The first major area for these negotiations involved the institutions of enforcement. The Ministry of Justice wanted private damage suits to be handled by the regular courts, despite the fact that the Tentative Draft already provided for exclusive jurisdiction of antitrust matters in the Tokyo High Court, and the original Kime Draft had called for a completely separate antitrust court. Salwin and Japan’s negotiators agreed to a separate antitrust panel in the Tokyo District Court.239

Salwin was also concerned about the Antitrust Commission’s lack of legal staff to handle its own litigation240 and the Ministry of Justice’s discretion over criminal enforcement. The Tentative Draft provided only that, in the case of a violation, the Commission could file an accusation with the Public Procurator General.241 Salwin proposed either that the Commission be given the power to institute criminal prosecutions itself with its own staff of trial attorneys, or that the Public Procurator General be required to bring the action on the Commission’s request. Japan’s negotiators “disapproved” these suggestions, but took under advisement Salwin’s further suggestion that the Public Procurator General be required to furnish legal services unless he determines that the Commission had acted “willfully.”242 The Japan side subsequently drafted a provision requiring the Public Procurator General, in cases where prosecution was requested but

238 Salwin prepared a list of discussion points the day after he received the Tentative Draft, which was dated Feb. 5, 1947. He listed 28 issues; the twenty-seventh was a paragraph-by-paragraph examination of the “SCAP bill” to determine the disposition or incorporation of those provisions in the “Government bill,” along with any reasons for rejections. Salwin Discussion Points, microformed on National Diet Library Microforms, supra note 47, ESS (C)-09597. There is no indication that such an examination was ever undertaken by the U.S. side.

239 See Conference Notes of Lester N. Salwin of Meeting held Feb. 6, 1947, with Mr. Hashimoto, Economic Stabilization Board, Mr. Kashiwagi, Ministry of Finance, assigned to Economic Stabilization Board to work on antitrust legislation, Mr. Ishii, Ministry of Justice, Civil Bureau, and Mr. Nishida, Ministry of Justice, Criminal Bureau 1 (Feb. 7, 1949) [hereinafter Salwin Conference Notes, Meeting Feb. 6, 1947]; Conference Notes of Lester N. Salwin, of Meeting with Mr. Hashimoto, Economic Stabilization Board, and Mr. Kashiwagi, Ministry of Finance 1 (Feb 12, 1947) [hereinafter Salwin Conference Notes, Meeting Feb. 12, 1947], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09597.

240 See Salwin Discussion Points, supra note 238, pt. 16.

241 See Tentative Draft, supra note 224, art. 54.

242 See Salwin Conference Notes, Meeting Feb. 6, 1947, supra note 239, at 3-5. Salwin pointed out that the U.S. experience had been that those who were familiar with the case all along were best able to handle the criminal prosecution. See id. at 4.
declined, to give the Prime Minister, through the Minister of Justice, written reasons explaining the failure to prosecute. This provision subsequently became law and the Commission retained its character as a bureaucratic agency.

The most critical point of contention regarding enforcement (at least as the two sides saw it at the time) was the question of how independent the Antitrust Commission would be and to which government official it would be required to report. Although five months earlier the Japan side had proposed that the antitrust enforcement agency be accountable to the Prime Minister, the Outline took the position that the agency should be under the control of the Ministry of Justice. The Japan side now pressed this latter view vigorously.

Salwin firmly objected to this proposal, even after hearing the arguments of the Chief of the Economic Section of the Criminal Affairs Bureau of the Ministry of Justice. Salwin’s objection did not derive from any theoretical view of the best way to fit this new agency into Japan’s existing parliamentary system. He simply wanted to keep antitrust out of the Justice Ministry’s hands. “The Ministry of Justice was looked upon as an unduly conservative, tradition-bound, legalistic group without sympathy for, or understanding of, antitrust legislation.”

Although Salwin and Japan’s negotiators agreed that the Commission “shall be as separate as possible” from the Ministry of Justice, and responsible only to the Prime Minister, the issue was serious enough to require the approval of Japan’s Cabinet. At a meeting held on February 18, 1947, the Cabinet acceded to SCAP’s position and voted to place the Commission under the Prime Minister. The Minister of Justice “in the final voting . . . stood alone.”

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243 This provision appears in the Third Revised Draft (Mar. 11, 1947) [hereinafter Third Revised Draft], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09595. At an earlier conference, however, it appears that the Japan side had agreed to make the prosecution mandatory upon the certification of the Commission. See Salwin Conference Notes, Meeting Feb. 12, 1947, supra note 239, at 1. See infra note 281 for further discussion of the wording of this provision.

244 See Antimonopoly Act, supra note 4.

245 See supra note 181 and accompanying text.

246 See Conference Notes of Lester Salwin of Meeting with Mr. Hashimoto, Economic Stabilization Board, and Mr. Kashiwagi, Ministry of Finance, assigned to Economic Stabilization Board to work on antitrust legislation, and Mr. Saburo Saito, Criminal Affairs Bureau, Ministry of Justice (Feb. 17, 1947), microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09597.

247 Conference Memorandum, supra note 161.

248 Salwin Conference Notes, Meeting Feb. 6, 1947, supra note 239, at 1 (handwritten).

249 Conference Notes by Lester N. Salwin with Mr. Hashimoto, Economic Stabilization Board, and Mr. Kashiwagi, Ministry of Finance, assigned to Economic Stabilization Board to work on antitrust legislation 1 (Feb. 18, 1947), microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09597.
Salwin also had three substantive issues high on his agenda. The Tentative Draft had no provision on intercorporate stockholding or international cartels, and the merger provision was still very permissive in comparison to the Kime Draft's absolute ban on mergers of competitors. The Japan side's reaction on each of these issues was to move closer to the U.S. position, while still leaving room for discretion to be exercised by the bureaucracy. On intercorporate stockholding, the Japan side agreed that pure holding companies would be outlawed, but wanted the Commission to have the authority to allow mixed holding-operating companies.\(^{250}\) For international cartels, the Japan side argued for the retention of an Imperial Ordinance (issued one year before), which banned participation in international agreements relating to price, output, or territories.\(^{251}\) This request was undercut with a proposal to allow the Commission to approve such agreements in the future.\(^{252}\) On mergers, the Japan side agreed to change a permissive pre-merger notification provision to one requiring pre-merger notification and the Commission's pre-merger approval.\(^{253}\)

\(^{250}\) See Salwin Conference Notes, Meeting Feb. 12, 1947, supra note 239, at 2 (holding-operating companies should be permitted to hold up to 50% stock of industrial corporations); see also Conference Notes of Lester N. Salwin with Mr. Hashimoto and Mr. Kashiwagi I (Feb. 14, 1947) [hereinafter Salwin Conference Notes, Meeting Feb. 14, 1947], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09597 (financial organizations should be permitted to have up to 10% stock ownership in any corporation).

\(^{251}\) The Ordinance barred any restrictive international contract "with respect to selling prices, quantities for sale, distribution, or any other restrictions relative thereto" and any restrictive international contract "with respect to markets for goods, customers, quotas and embargoes, exchange of scientific and technical knowledge or information." The penalty for participating in such agreements was three years in jail and a ¥10,000 fine. Edwards Report, supra note 47, ch. 1, at 14-15.


\(^{253}\) See Salwin Conference Notes, Meeting February 14, 1947, supra note 250, at 2. Among the other points Salwin raised, the draft bill only provided for fines and imprisonment, in contrast to the wealth of alternative sanctions in the Kime Draft. See supra note 174 and accompanying text. The Japan side agreed to give further consideration to including some alternative sanctions. See Salwin Conference Notes, Meeting Feb. 14, 1947, supra note 250, at 3, some of which were included in the enacted legislation, Antimonopoly Act, supra note 4, art. 100 (permissive revocation of patent rights; permissive debarment from government contracts for a period of six months to three years). The Japan side also agreed to a central complaint department to which people could convey information on restraints of trade. See id. at 3. This provision became Article 45 of the enacted legislation and was used at least in the early days of enforcement. See SCAP HISTORY, supra note 4, at 84-85, 96 (reporting that in the 1949-1950 period, business complaints "began to pour in"; this followed an extensive campaign to educate the people and small business firms about the antitrust law through use of radio, magazine articles, newspapers, posters, and pamphlets).
H. The Revised Drafts

Following this round of negotiations the Japan side produced at least five more drafts of the Antimonopoly Act as the two sides moved toward final agreement.254 Salwin marked up these drafts with numerous handwritten suggestions and met frequently with Japan's negotiators.255

Salwin received the first of this series of drafts (marked by Salwin as the “1st Revised Draft”) on February 28, 1947 (“First Revised Draft”).256 Accompanying it was a memorandum that asks for reconsideration of the U.S. position regarding limits on growth by merger and the apparent U.S. insistence on strict limits on corporate size.257

The memorandum repeats a familiar theme, one that has run through Japan's economic approach and objections to certain U.S. antitrust proposals. Japan wants to ensure that its firms can be large enough to

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254 The Japan side first produced a “revised draft,” dated February 25, 1947. There are, however, two somewhat different versions of this draft. One was marked by Salwin as received on February 28, 1947. See The Imperial Japanese Government, Economic Stabilization Board, Prohibition of Private Monopoly and Preservation of Free Trade Bill (revised draft) (Feb. 25, 1947) [hereinafter First Revised Draft], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09596. The other (with the same title) was marked as received on March 3, 1947. The Imperial Japanese Government, Economic Stabilization Board, Prohibition of Private Monopoly and Preservation of Free Trade Bill (revised draft) [hereinafter Revised Draft Received Mar. 3, 1947], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09595. A “second revised draft” was noted as received by Salwin on March 6, 1947; only a partial copy of this draft could be found in the SCAP documents. The Imperial Japanese Government, Economic Stabilization Board, Prohibition of Private Monopoly and Preservation of Free Trade Bill (second revised draft) [hereinafter Second Revised Draft], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09595. A “third revised draft” was marked as received on March 11, 1947. Third Revised Draft, supra note 243. The next version was denominated as a “Bill” and bears a date of March 15, along with a “confidential” notation. See The Imperial Japanese Government, Economic Stabilization Board, Prohibition of Private Monopoly and Preservation of Free Trade Bill (revised draft) [hereinafter Draft of March 15], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09595. Some sections of this version are missing from the file, and some changes were made between this version and the final bill that was enacted on March 31, 1947. No later draft, however, could be located in SCAP files.

255 There are no formal memoranda of meetings, but Salwin's handwritten notes indicate that he and Eleanor Hadley had conferences with Kashiwagi and Hashimoto on March 3, 4, and 5. See Revised Draft Received Mar. 3, 1947, supra note 254. Another handwritten note (apparently by Salwin, dated March 10, 1947) states “Conferences were held [sic] daily from 28 Feb-8 March 47-ending Saturday 8 March 47! A whole week of (Mon.-Sat.) of conferences!” Conference Notes Staff Meeting, microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09599.

256 See supra note 254.

257 The memorandum, written by one of the two Japan negotiators, indicates that the Anti-Trust Law Preparatory and Investigation Committee and the Cabinet Board of Legislation had not seen the draft, although the negotiator would have them consider it “at once.” Memorandum from R. Hashimoto, Economic Stabilization Board on Antitrust Bill, to Mr. Salwin 1 (Feb. 26, 1947) [hereinafter Hashimoto Memorandum], microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09596. The memorandum begins, “After careful study of your views on our draft which you expressed to me lately we have come to a decision to revise [sic] the draft as in the attached enclosure.”
compete in foreign markets and against foreign firms. The memorandum argues that Japan, "a country poor in resources and of low productive capacity," is constantly "in danger of foreign competition." Even large companies in Japan can readily be "overwhelme[d] by overseas competition."\(^{258}\) Further,

> [t]he Japanese market is so small that the productive capacity of a company which comprises the proper economic unit from the point of efficiency in production needs in many cases to amount to a considerably large part of the total domestic production. If we are to determine a monopoly by the ratio of total domestic production, it is feared the size of the enterprise may become too small to enable it to stand on its own feet economically.\(^{259}\)

The memorandum urges that mergers should not be judged by an inflexible "share of control" standard, which Japan believed the United States sought. Rather, the memorandum asserts that legality should depend on whether the merger might "come to restrict substantially competition within a certain field of trade."\(^{260}\)

The memorandum also urges the United States to reconsider its view that there be some absolute limits on the amount of capital a single firm could have. It states that, "[t]he size of an enterprise differs greatly according to the type of business, and it does not make much sense in establishing a flat limit to the amount of capital of an enterprise."\(^{261}\)

Japan's positions on these two points are quite different from the views expressed in both the Edwards Report and the Kime Draft. Both the Edwards Report and the Kime Draft call for very strict limits on mergers, and the Kime Draft proposes a yen-limit on corporate size. Japan's argument on absolute firm size, however, is closer to the position originally taken in the Edwards Report, which had recommended a flexible approach to account for scale economies.\(^{262}\)

Despite the constancy of the U.S. position, Japan prevailed on both these points. Salwin agreed that mergers should be judged by their

\(^{258}\) Id. at 1.

\(^{259}\) Id. at 2.

\(^{260}\) Id. The Japan side apparently believed that the United States wanted a provision that mergers would not be permitted if the company had control over "commerce, industry or trade in excess of a certain ratio to be established by the Diet." Salwin noted in the margin, however, that there was "no such statement." Id. at 1.

\(^{261}\) Id. at 2.

\(^{262}\) See supra notes 116-117 and accompanying text; see also supra Table 3.
competitive effect within a market and there is no further mention of any provision to restrict the absolute size of Japan's firms.\footnote{Salwin's agreement on the merger standard is noted "OK" in the margin. Hashimoto Memorandum, supra note 257, at 2. On the issue of absolute asset size, Salwin's marginal note is, "point was only permission to increase over ¥200 million for example." Id.}

The First Revised Draft that accompanied the memorandum otherwise agrees to many of the changes urged by Salwin in the series of meetings that preceded its drafting and moves substantially closer to the final provisions and language of the Antimonopoly Act. On the institutional side, the First Revised Draft places the Antitrust Commission under the Prime Minister's jurisdiction and provides for a panel of five judges in the Tokyo High Court with exclusive jurisdiction for matters arising under the Act. On the substantive side, the First Revised Draft has a new merger provision which is virtually identical to the one in the final Act, as well as a new provision banning holding companies. It also contains new provisions relating to international cartels, intercorporate stockholding, and control associations, although these provisions were later redrafted.

The First Revised Draft continues Japan's effort to permit the bureaucracy to maintain both control and flexibility. The merger provision requires Antitrust Commission approval of all mergers and the standard for approval is a positive one; not only must the merger not "cause a substantial restraint of competition," it must also lead to rationalization of management or production.\footnote{First Revised Draft, supra note 254, art. 13.} Unlike the Tentative Draft, the First Revised Draft contains no per se provision. Enumerated anticompetitive acts (such as price-fixing) are made illegal only if they "substantially restrain, contrary to
the public interest, competition in any particular field of trade.” The new provision on international agreements requires Commission approval of such agreements and approval is not to be given if the agreement is “contrary to the public interest.” Although the First Revised Draft bans holding companies and stock acquisitions (both for the first time), it permits the Commission to approve the acquisition of stock in a supplier or customer if such an acquisition is in the public interest.

Over the next seventeen days Japan produced at least three more revisions of the bill in an effort to reach an outcome acceptable to both sides. Several key disagreements can be seen in these drafts. One is the treatment of international and domestic cartel agreements. The “Second Revised Draft,” received by Salwin six days after he reviewed the First Revised Draft, attempts to carve out a larger exemption for international agreements. It exempts “production restrictions” in international agreements (relating either to volume or the field of production) if they are “normal and legitimate restrictions of such trade.” Salwin had a pithy reaction to this proposal, which was penned in the margin of the Draft—“out.”

The “Third Revised Draft,” received by Salwin five days later, on March 11, prohibits only those international contracts that “substantially restrain competition in a particular field of international or domestic trade and thereby [are] contrary to the public interest.” Again, Salwin objected, also crossing out language that would have similarly limited the “per se” restraints to those domestic contracts that did not “substantially” restrain competition “contrary to the public interest.”

Whether only “substantial” restraints on competition would be illegal was an important issue for the Japan side. It could not be settled just by Japan’s negotiators, but required a Cabinet meeting before Japan would agree. On March 18, the Cabinet met and agreed to language that was

265 Id. art. 5. Salwin bracketed the “contrary to the public interest” language and wrote “and is therefore” above it. The Tentative Draft had absolutely prohibited certain enumerated acts, but then gave the antitrust enforcement authority the power to approve these agreements if they were “in the public interest.” See supra note 227 and accompanying text.

266 First Revised Draft, supra note 254, art. 6.

267 Id. arts. 9 (holding companies), 10 (stock ownership).

268 See Second Revised Draft, supra note 254, art. 11.

269 Id. On the other hand, Salwin added a provision exempting an international agreement that is an “ordinary agency contract providing for purchase and sale which does not substantially restrict competition in any particular field of international or domestic trade.” Id. art. 10. This provision was subsequently incorporated by the Japan side into the Third Revised Draft, only to be stricken by Salwin. See Third Revised Draft, supra note 243, art. 5.

270 See Third Revised Draft, supra note 243, art. 5. This language was closer to the comparable provision from the First Revised Draft. See supra note 266 and accompanying text.

271 See Third Revised Draft, supra note 243, art. 4.
narrower than the language proposed in the Third Revised Draft, but that still preserved some limited discretion for the Antitrust Commission. Domestic and international cartel agreements would be exempt if they have "negligible" effects on "competition within a particular field of trade." This provision became law.

Another critical issue was the scope of the private cause of action. The First Revised Draft continues the Tentative Draft's effort to limit the private action to violations of the Act that were done "willfully" or were "due to gross negligence" and tries to cut the statute of limitations period down from three years to one. Salwin flagged the willfulness defense language in the First Revised Draft (by underlining it). By the Third Revised Draft, dated March 11, this provision had been removed (a fact noted by Salwin) and the statute of limitations period returned to three years. The next version of the bill, dated March 15, explicitly states that this willfulness defense will be unavailable.

On the other hand, during the drafting process Salwin failed to focus on the problems associated with a provision that made the right to bring a private suit dependent on a prior final action by the antitrust enforcement agency. Such a provision, of course, would confine the private right of action to only those restraints that the government was willing to oppose. Language in the Third Revised Draft was ambiguous on the point and, in fact, this restriction on the private right was omitted completely from the March 15 draft. The Japan side apparently realized it had made a mistake, however. The provision returned in the final bill.

Salwin played barely any role, however, in one very important area, the definition of "unfair methods of competition." The ideas for what would be considered "unfair" appear to have come from the Japan side and were substantially set in the Tentative Draft. The only substantive change to the definition came in the Third Revised Draft when the Japan side added another example of an unfair method of competition. "Furnishing funds to another party on such conditions that shall unduly restrain transactions

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272 See Handwritten Notes (Mar. 18, 1947) (apparently Salwin's handwriting), microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09594. (Hashimoto indicated that the Cabinet agreed to the "negligible effects" language for Articles 4 and 5 at its meeting of March 18.)

273 See Antimonopoly Act, supra note 4, arts. 4, 6.

274 See First Revised Draft, supra note 254, art. 25. For discussion of the provisions of the Tentative Draft, see supra notes 231-233 and accompanying text.

275 See Draft of March 15, supra note 254, art. 25.

276 See Third Revised Draft, supra note 243, art. 26 (prior agency decision appears only to toll statute of limitations); Draft of March 15, supra note 254.

277 See Antimonopoly Act, supra note 4, art. 26.

278 See supra note 225 and accompanying text.
between said party and his competitors, suppliers, or customers, or on condition that the appointment of officers of the company of said party shall be subject to prior approval on part of oneself.\textsuperscript{279} This additional provision appears to respond directly to conduct used by the zaibatsu for controlling smaller companies (including the posting of officers as a way of control).\textsuperscript{280} Its inclusion by the Japan side is further support for the view that the Japan side understood that one of the goals of antitrust law is the democratization of the economic process, which includes enabling entrepreneurs to function without being coerced by other firms.

I. Passage of the Bill

While Salwin continued to edit the language of the March 15 draft,\textsuperscript{281} the approval of other necessary parties was being secured. Copies of an earlier draft had been sent to various SCAP Divisions on March 2. Although this draft was judged "satisfactory" by those consulted, there is no indication that these other SCAP divisions were ever shown later drafts, or the actual final bill.\textsuperscript{282} On March 11, 1947, Japan’s government announced after a Cabinet meeting that a bill would be introduced the following week, but a further Cabinet meeting on March 18 was needed to give final approval to certain critical sections.\textsuperscript{283}

Because of the difficulties in getting final approvals, as well as the desire to refine the language of the bill, it began to appear unlikely that the bill could be passed in the Diet session which was to end on March 27. On March 14, Japan’s representatives agreed that the government “would do everything possible to get it introduced, with the understanding that this would be accomplished for educational purposes—without any commitment

\textsuperscript{279} See Third Revised Draft, supra note 243, art. 2. This language changed slightly in the Draft of March 15 (to the language that would be the final language of the bill), but not in response to Salwin’s suggestions. Salwin’s marginal handwritten suggestions on the Second Revised Draft were to add “unreasonable coercive conditions attached to loans” and the promulgation of “industry-wide codes of fair competition” (he suggested the latter in a marginal notation on the First Revised Draft as well). The Japan side never adopted either suggestion.

\textsuperscript{280} See supra notes 26, 79-82 and accompanying text.

\textsuperscript{281} For example, in Article 73, the criminal referral provision which had been the subject of some negotiation, Salwin inserted “criminal” into the following sentence: “if it [the Commission] considers that a criminal violation of the provisions of this law exists.” See Draft of March 15, supra note 254, art. 73. In the prior Third Revised Draft, Salwin had inserted “criminal” at a different point in the sentence (“violation of the criminal provisions of this law exists”), but no change was made by the Japan side in the Draft of March 15. The final bill reflects Salwin’s March 15 insertion. See Antimonopoly Act, supra note 4, art. 73.

\textsuperscript{282} See Salwin Memorandum, supra note 178, at 5 (reports eventually received from Finance, Labor, and Legal Divisions).

\textsuperscript{283} See id. at 6-7 (international cartels and corporate ownership of stock in subsidiaries).
that it actually be passed by the Diet."\textsuperscript{284} The following day, however, it was reported to Salwin that "there was a movement among certain political leaders to put off passage of the antitrust bill until the next session of the Diet, after the general elections in April.\textsuperscript{285}"

Japan’s government officials involved in the actual drafting of the legislation wanted the bill enacted at the current Diet session and asked for SCAP’s views and support on the matter. Although not everyone in SCAP favored pushing ahead in the current session, Salwin gave approval to the plan.\textsuperscript{286} Two days later, after the Cabinet meeting of March 18, it was reported to Salwin that the government and Cabinet “generally strongly desired to have the bill introduced and passed at this session.”\textsuperscript{287} Japan’s government officials solicited SCAP’s assistance when the bill was presented “by issuing a press release to the effect that it looked with favor upon its enactment.”\textsuperscript{288}

It seems apparent that those persons most closely involved in drafting the legislation wanted to get the bill enacted without further delay, even though this meant that not all the parties would be able fully to review the legislation. The bill was not even received in Washington, D.C. until April 8, after it had already been enacted into law.\textsuperscript{289} In Japan, there was no time for legislative review. In fact, the government of Japan’s original press release contains the following language:

Due to the lack of time, it proved to be impossible for the forementioned committee [the Anti-monopoly Preparatory Committee] to study and discuss the final draft of this bill, but the understanding of the committee was obtained to submit the bill without further study. Furthermore, it is regretted that the

\textsuperscript{284} Id. at 7.
\textsuperscript{285} Id.
\textsuperscript{286} See id. (noting that Salwin’s Division decided that the bill’s introduction should not be delayed). The Government Section had informed Kupferer on March 18 that it had “no objection” to passage of the Act, “but that they did not consider it priority legislation for enactment at the present Diet session.” Memorandum from Victor H. Kupferer, Introduction into the Diet of Anti-Monopoly Bill, to File (Mar. 20, 1947), microformed on National Diet Library Microforms, supra note 47, Sheet ESS (C)-09594.
\textsuperscript{287} See Salwin Memorandum (Supp.), supra note 178.
\textsuperscript{288} See id. The Japanese government officials were Kashiwagi and Hashimoto. Id.
\textsuperscript{289} See Conference Memorandum from Lester N. Salwin, Discussion Between Lester Salwin and Walter Hutchinson of the Deconcentration Review Board 3 (July 30, 1948), microformed on National Diet Library Microforms, supra note 47, Sheet ESS (B)-12067. In this memorandum Salwin describes the April 8 date as being “prior to passage,” but, in fact, it was after. Salwin also reported that “[n]o communications were received from Washington objecting to or criticizing its provisions.” Id. at 3. In fact, it does not appear that any communications were received from Washington about the law one way or the other.
originally scheduled public hearings could not be held owing to
the fact that the close of this session of the Diet was so near.  

The government introduced the bill on March 25. The session of the
Diet had been extended for three days, until March 31, but consideration of
the bill did not begin until March 28, at a time when forty-three other bills
were also under consideration. The legislation was passed in the final
hours of the night on March 31, 1947, the last day of the last Imperial
Assembly under the old Meiji Constitution.

J. Whose Bill Was It Anyway?

The record of the drafting of the Antimonopoly Act reveals an
authority imbalance between the two sides. The U.S. side set the broad
policy for the direction of the legislation, a policy direction that the Japan
side, under occupation, had little choice but to follow. But Japan was, in a
sense, more concerned about the legislation than the United States. This
meant that in the actual give-and-take of negotiations over the specifics of
the legislation, the Japan side had more depth. More and higher-ranking
officials of Japan's government, including the Cabinet, were involved in the
process than the few people working on the U.S. side. Of course, Salwin
had extensive input into the final legislation but, although he reviewed all
the drafts and made many changes, many of his suggestions were not
adopted by Japan. Perhaps this is why Salwin subsequently described his
role as merely making the draft prepared by the Japanese into good
English. Beyond Salwin, there was no effective layer of review. Indeed,
no real U.S. expert on antitrust law after Kime worked on this legislation.
In the resulting legislation, Japan's government was able to move from the original proposal, an ambitious U.S.-style piece of legislation, to one that was more suited to Japan's economic ideas and its view of the proper roles of government and free markets in controlling economic decisions. Consistent with the SSC Report's views on the need for large-scale companies, no limits were imposed on the absolute size of Japanese corporations. Without ever drawing a peep of protest from the U.S. side, Japan's government effectively gutted the private action, thereby insuring that control over antitrust policy would remain fully in the hands of the bureaucracy rather than being shared with the judiciary or private parties. By writing in an exemption from the statute for collaborative behavior by "small-scale entrepreneurs," Japan's negotiators were able to preserve the possibility of such conduct, as the SSC Report had urged. Although Japan's negotiators were not able to dilute fully the per se prohibitions on domestic and international cartel behavior, they did achieve a modified market impact test.296

The record of what Japan's negotiators achieved, however, is not just a negative one of rejecting U.S. proposals. There was no objection to an extensive list of prohibited unfair methods of competition and, in fact, Japan's negotiators elaborated on the list. Prohibiting such behavior was consistent with the SSC Report's view that markets needed to be opened to competition from entrepreneurs that had been under the control of the zaibatsu, and that the post-War economy would need to be opened up. There was also no objection to the basic idea that cartel behavior could have adverse economic effects, even if Japan's government did not want to ban all collaborative behavior.

It is quite clear from the drafting process that Japan's negotiators had a good command of the concepts in the law and the consequences of the law's language. Perhaps, Japan would have preferred to postpone the adoption of such legislation (or never to have adopted antitrust legislation at all). It cannot be said, however, that Japan's government had no idea what it was getting.

295 See Antimonopoly Act, supra note 4, art. 24-1 (exemption for such associations established "in accordance with the provisions of separate law"). See supra note 95 and accompanying text.
296 The per se provisions were repealed in 1953 when the statute was amended. For discussion of Act No. 259 of 1953, see MATSUSHITA, supra note 6, at 3; First, supra note 235, at 157.
V. Conclusion

A major purpose of this Article has been to set the record straight on who was responsible for Japan’s Antimonopoly Act. The Article began by setting the Act in the context of Japan’s pre-War economy and industrial structure, noting in particular the need in Japan for legislation to force firms to form cartels. The Article then reviewed the post-War process of enacting Japan’s antitrust law: General MacArthur’s initial directive; the first draft prepared on the U.S. side; the rejection of that draft by Japan’s government and its initial Outline proposal; the U.S. rejection of that proposal and Japan’s subsequent production of the Tentative Draft; the negotiations over the provisions of the Tentative Draft and the production on the Japan side of at least five further revisions before the final provisions and language were acceptable to both sides; and the passage of the legislation in the Diet.

It took nearly a year and a half to get this legislation enacted. Seven months of that time was devoted to the actual drafting of the legislation. The amount of time required for enacting this bill, alone, indicates that antitrust was not a United States diktat. A close examination of the actual language of the key drafts prepared on the Japan side confirms that much of the final language originated on the Japan side and many key provisions were changed from what the United States had first proposed. The idea of enacting an antitrust law might have come from the United States, but the actual content of that legislation was very much a product of Japan’s government.

The story of the original intent of Japan’s Antimonopoly Act, however, is not just a chronology of legislative drafting, although this is important in understanding how the Act took the shape that it did. This Article has reviewed two key documents of the time, which help us think about the reasons for adopting antitrust in Japan fifty years ago. One critical document is the Report of the Special Survey Committee, prepared by a group of Japanese government and economic experts. This influential report on Japan’s economy and its post-War direction was issued at the same time that Japan’s government was providing its initial response to the first U.S. draft of an antitrust law. The other critical document is the Edwards Report, a study of Japan’s economy done in Japan by a team of U.S. experts and completed while the SSC Report was being finished.

Examination of the similarities and differences in the approach of both documents helps explain the goals and institutional approaches of Japan’s antitrust law. Both reports stressed the importance of opening Japan’s markets to independent business firms—“economic democratization” in the
words of the SSC Report. Both reports exhibited an understanding that large firm size might be necessary for efficiency (though the SSC Report was more concerned with preserving large efficient firms than the Edwards Report). Both reports expressed the view that zaibatsu multi-market control had gone too far as both an economic and a political matter.

The reports differed in their institutional approaches to these problems, however. The Edwards Report stated a belief that free markets would work, at least if there were active government antitrust enforcement to police those markets by stopping collusive and exclusionary practices. The SSC Report reflected a more skeptical stance about the ability of free markets to produce the proper economic results (in particular, the rebuilding of a devastated economy) and it predicted the need for a continuing state role in the economy.

The similarities in approach help explain why Japan accepted certain provisions without much complaint, particularly the provision allowing the restructuring of firms with “undue substantial disparities in bargaining power” (referred to by the Japan side as “octopus firms”). They also help explain the Japan side’s interest in clearly defining the types of exclusionary practices that would be considered “unfair methods of competition.” On the other hand, the differences in approach help explain why the Japan side fought so hard to keep antitrust enforcement within the control of the bureaucracy by narrowing the private right of action and resisting all efforts to provide the antitrust enforcement agency with a legal staff that could independently seek relief in court. Antitrust enforcement would be a component of bureaucratic economic regulation rather than a part of a legal structure which could be utilized by those harmed by anticompetitive conduct.

Finally, the story of the original intent of Japan’s Antimonopoly Act is not just a history of events half a century past. It is one of those curiosities of history that Japan’s Antimonopoly Act was passed a year before the emergence and subsequent death of a proposal for an international antitrust agreement, the Havana Charter. Fifty years later, in a similar time of post-War peace, the idea of an international antitrust agreement has resurfaced.


298 For a well-elaborated draft international code produced by a group of scholars known as the “Munich Group,” see *Draft International Antitrust Code As a GATT-WTO-Plurilateral Trade Agreement*, 64 BNA ANTITRUST & TRADE REG. REP. (Spec. Supp. Aug. 19, 1993). An alternative minimal approach is set out id. at S-7. The European Commission, after studying how antitrust might be internationalized, requested the World Trade Organization to consider the issue at its ministerial conference held in Singapore in December 1996. The WTO deferred action, but did establish a “working group to study issues raised by
The way that we analyze antitrust problems has changed greatly in those fifty years. Greater attention to economic analysis has led to a greater understanding of certain business practices. We now see that some forms of collaboration can be efficient. We also realize that not all exclusive practices should be viewed as exclusionary. This does not mean, however, that the goals animating the drafters of Japan’s antitrust law are irrelevant today. Nor does it mean that the economic insights of those who studied Japan’s industrial organization offer no help to us today. If anything, Corwin Edwards’ focus on the exclusionary practices of dominant (even if not monopoly) firms in Japan seems quite relevant to today’s renewed interest in exclusionary practices.

Perhaps the most important lesson that this story of legislative intent holds for a future international antitrust agreement is to remind us of the importance of the institutions of antitrust enforcement. The United States and Japan integrated antitrust law into different enforcement cultures. Japan successfully resisted U.S. efforts to make antitrust enforcement more into “law.” Although the enforcement efforts immediately after the enactment were promising, subsequent enforcement of Japan’s antitrust law suffered. Those who wish to see effective antitrust enforcement on an international level would do well to keep this lesson in mind. It is not only the substantive provisions and the goals of antitrust that matter. The institutions of enforcement matter as well.

299 For a description of these early enforcement efforts, see First, supra note 235, at 148-55.