Santa Clara Law School Summer Program

Public Regulation of International Trade in Japan (Revised Version: 2014)

Mitsuo Matsushita

1. Constitutional framework of international trade regulation

- Articles 22 and 29 of the Constitution
- The COCOM Case

[Exhibit 1] Mitsuo Matsushita, "The Constitution and the Freedom of Business Activities", in Mitsuo Matsushita: *International Trade and Competition Law in Japan* (Oxford University Press, 1993), pp. 14-27

2. International trade agreements and domestic economic regulations

- Treaty-making powers
- Article 98-2 of the Constitution
- The Nishijin Necktie Case

[Exhibit 2] Mitsuo Matsushita, "International Trade Agreements", in Mitsuo Matsushita: *International Trade and Competition Law in Japan* (Oxford University Press, 1993), pp. 27-43

3. Forms of regulatory systems

- Basic laws
- Master plan by the government
- Utilization of private associations
- Licensing of business activities
- Administrative guidance

[Exhibit 3] Mitsuo Matsushita, "Different Regulatory Methods", "Administrative Guidance", in Mitsuo Matsushita: *International Trade and Competition Law in Japan*

(Oxford University Press, 1993), pp. 43-73
[Exhibit 3-1] Mitsuo Matsushita, "Re: ANA Antitrust Issues" (an affidavit)

4. Major laws relating to international trade regulation

- Export control laws
- Import control laws
- Foreign exchange and investment laws
- Antitrust laws
- Consumer protection laws
- Government procurement laws

[Exhibit 4] Mitsuo Matsushita and Shintaro Watanabe, "Trade regulations and trade remedies", *The Asia-Pacific Antitrust & Trade Review 2006* (Global Competition Review), pp. 45-47

[Exhibit 5] Noboru Kashiwagi, "Foreign direct investment, public order and national security: Lessons from the case of J Power", University of Tokyo Journal of Law and Politics, Vol. 6 (Spring 2009), pp. 45-55

[Exhibit 6] Mitsuo Matsushita, "An Overview of the Antimonopoly Law", in Mitsuo Matsushita, *International Trade and Competition Law in Japan* (Oxford University Press, 1993), pp. 86-99

[Exhibit 7] Tokyo District Court Judgment, 22 March 1988 (Japan v. Toshiba Machinery Co.), in *The Japanese Annual of International Law*, No. 31, 1988, pp. 206-211

[Exhibit 8] Mitsuo Matsushita, An Overview of the Consumer Protection Law and Policy in Japan.

[Exhibit 9] Mitsuo Matsushita, "Major WTO Dispute Cases Concerning Government Procurement, *AJWH*, Vol. 1, pp. 299-315.

5. Intellectual property rights and international trade

- Parallel importation of genuine trademarked goods
- The Parker Fountain Pen Case (trademark)
- The Fred Perry Case (trademark)
- The BBS Case (patent)
- The CONVERSE Trademark Infringement Case
- Antitrust implications of blocking parallel importation
- Patent and territorial principle

[Exhibit 10] Mitsuo Matsushita, "Issues Regarding Parallel Importation of Trademarked and patented Products and Competition Policy in Japan", in Petros Mavriodis & Thomas Cottier (ed): *Intellectual Property, Trade, Competition and Sustainable Development* (University of Michigan Press, 2003), pp. 189-198

[Exhibit 11] Judgment of February 27, 1970, Osaka District Court, in *The Japanese Annual of International Law*, No. 16, 1972, pp. 113-135

[Exhibit 12] Judgment of February 27, 2003, Supreme Court, in *The Japanese Annual of International Law*, No. 47, 2004, pp. 209-211

[Exhibit 13] Judgment of July 7, 1997, Supreme Court, (BBS, Inc. v. Racim Japan), in *The Japanese Annual of International Law,* No. 41, 1998, pp. 100-103

[Exhibit 13-1] Supplemental Teaching Materials (1), pp. 1-3

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6. Interplay and conflict of U.S. and Japanese regulations

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[Exhibit 14] Judgment of July 11, 1997, Supreme Court (Northcon v. Mansei Kogyo Co.), in *The Japanese Annual of International Law,* No. 41, 1998, pp. 104-109

[Exhibit 15] Mitsuo Matsushita and Aya Iino, "The Blocking Legislation as a Countermeasure to the U.S. Anti-Dumping Act of 1916. A Comparative Analysis of the EC and Japanese damage Recovery Legislation", *Journal of World Trade*, Vol. 40, No. 4, August 2006, pp. 753-776

[Exhibit 15-1] Private International Law-Labor Contract-Although personal services agreement between American pilot and American Air Service Company stipulates U.S. law, where services were rendered by employees in and employee was dismissed in Japan, as a matter of public policy the contract and the effect of dismissal will be interpreted according to Japanese law, *The Japanese Annual of International Law*, No. 10 (1966), pp. 1889-196

7. U.S./Japan antitrust disputes

- Matsushita Electric Industrial Company et al v. Zenith Radio Corp.
- The Tanner Crab Case
- The Daishowa Case
- The Fax Paper Case
- The TV Tubes Case
- The Empagran Case

[Exhibit 16] *Matsushita Electric Industrial Co., Ltd., et al v. Zenith Radio Corporation et al*, 1986 Trade Cases P67, 004 See also *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 505 F. Supp. 1125 (ED. Pa. 1980)

[Exhibit 17] *United States v. C. Itoh & Co., Ltd. et al,* 1982-83 Trade Cases P 65-10 (U.S./D./C., WD. Washington (Oct. 20, 1982); Yusaf H. Akabar: *Global Antitrust-Trade and Competition Linkages* (Ashgate Publishing Co., 2003), pp. 39-74

[Exhibit 17-1] Mitsuo Matsushita, "Alaskan Tanner Crab Investigation" (An affidavit)

[Exhibit 18] Cheryl R. Adler, "Daishowa International v. North Coast Export: An Alternative Approach in the Judicial Balancing of International Comity Considerations", *Law and Policy in International Business,* Vol. 15, p. 613 et seq (1983)

[Exhibit 19] Abbe Gluck "Preserving Per Se", Y*ale Law Journal*, Vol. 108, p. 915 et seq (1998-99).

[Exhibit 19-1] Supplemental Teaching Materials (3), pp. 13-15

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[Exhibit 20] Industrial Structure Council, METI, Japan: 2*007 Report on Compliance by Major Trading Partners with Trade Agreements-WTO, FTA/EPA and BIT*, pp. 247-258

[Exhibit 21] *Japan-Taxes on Alcoholic Beverages*

[Exhibit 22] *Japan-Measures Affecting Consumer Photographic Film and Paper*

[Exhibit 23] *Japan-Measures Affecting Agricultural Products*

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8. Current Issues – U.S. and Japan in TPP Negotiations

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and Investments Ombudsman (OTO) deals with cases in which foreign exporters, foreign governments, or a domestic importer complain about the enforcement of trade statutes.[7] They are considered in greater detail later.

1.3 The Constitution and the Freedom of Business Activities

A. GUARANTEE OF PRIVATE ENTERPRISES UNDER THE CONSTITUTION

The Japanese economy is basically a market economy in which private enterprises are mainly responsible for producing and distributing goods and services. As in other countries which adopt a market economy, in Japan the price mechanism is the most basic economic institution. As we will examine later, even though there is some government involvement in economic activities, it is generally accepted that the role of the government in the economy should be kept to a minimum so that private initiatives are not unduly hampered. In this sense, we can say that private enterprises are the most important factors in the Japanese economy.

However, there is no country in the world which adopts a market economy in which the philosophy of '*laissez-faire*' is maintained in its pure form. Every market economy is inevitably a mixture of the market and government involvement in the economy up to a certain point. In this sense, the Japanese economy is also a hybrid of the market and government involvement. This is a subject of great interest among economists and political scientists, and there are extensive writings on this subject.[8] Even though we must refrain from a detailed discussion of the economic advantages and disadvantages of this hybrid system in Japan, we will make an analysis of this hybrid system from a legal standpoint.

The most important dimension in such a legal analysis is the constitutional framework for private enterprises, that is, the question as to how much the government can control by laws the activities of enterprises under the Constitution, or conversely the extent to which private enterprises are guaranteed freedom of activity under the Constitution.

There are two constitutional provisions which guarantee the existence and activities of private enterprises. One is Article 22 and the other is Article 29 of the Constitution. Detailed discussions of the interpretations

[7] Matsushita and Schoenbaum, *Japanese International Trade and Investment Law* (Tokyo, 1987), 44–5.

[8] See e.g. Komiya *et al.* (eds.), *Nihonno Sangyo Seisaku* (*Japanese Industrial Policy*) (Tokyo,1984), and Johnson, *MITI and the Japanese Miracle* (Stanford, Calif., 1982).

of these provisions are given in the following sections. Here we will briefly look at the structure of these two constitutional provisions.

Article 22 of the Constitution declares that the freedom of occupation is guaranteed. It also states that the freedom of occupation can be restricted for the purpose of promoting public welfare. The activities of private enterprises are included within the scope of the freedom of occupation as provided for in Article 22 of the Constitution. Therefore, the freedom of activity of private enterprises is guaranteed and can be restricted by law only when necessary for promoting public welfare.

Article 29 of the Constitution declares that private property is guaranteed. Private property is the basis for private enterprises, without which no private enterprise can exist. Article 29 guarantees that no private property can be taken away or restricted unless to do so is necessary for promoting public welfare.

Both Articles 22 and 29 of the Constitution form the constitutional basis for the private enterprise system in Japan.

B. THE RULE OF LAW AND THE REGULATION OF BUSINESS ACTIVITIES

As explained above, the freedom of private enterprise business activities is guaranteed under Articles 22 and 29 of the Constitution. However, that freedom is not without limitation. It can be restricted if necessary for the purpose of promoting public welfare. An important question is the meaning of 'public welfare'. There are several aspects of the public welfare concept which need to be discussed, and they are considered in the following sections. Here we will discuss one aspect of it, that is, the rule of law and government regulation of business activities.

As a general principle, public welfare must be explicitly declared in the form of legislation. Since the freedom of business activities is a constitutional right expressed in the Constitution, in order to restrict it for the purpose of promoting public welfare, there must be a clear declaration of it by the legislature. A mere statement of policy by the Executive Branch is not sufficient. Legislation is an expression of the will of the people, and it can be regarded as a sufficient ground for restricting the freedom.

The decision handed down in the *COCOM* case[9] in 1969 by the Tokyo District Court is a good expression of this principle. In this case, an export ban applied on some electronic devices under the Foreign Exchange and Foreign Trade Control Law (hereafter referred to as 'the

[9] The 1969 Peking–Shanghai Nihon Kogyo Tenrankai Case, Decision of Tokyo District Court, 8 July 1969, *Gyōsai Reishū*, 20 (1969), 842 *et seq.*

Control Law') was held to be unconstitutional. A group of business persons in Japan wished to export electronic devices to the People's Republic of China and exhibit them in a trade show held there. At this time, the products in question were listed as controlled items under the Control Law since they were part of the products whose export to Communist countries was prohibited under the COCOM agreement and, in exporting such items, the exporter needed to file an application with the MITI and obtain an export approval.

When an application for approval of export was filed with the MITI, the MITI refused and the persons who wished to export filed a suit with the Tokyo District Court for an injunction restraining the MITI from refusing an approval of export. In the proceedings, the plaintiffs argued that the freedom to export was part of the freedom of business activities (the freedom of occupation) guaranteed by Article 22 of the Constitution and could be restricted only if such a restriction was necessary to promote public welfare, and that in this case the prohibition of export did not come into this catogory.

The Tokyo District Court held that the refusal by the MITI to grant an approval in this case was unconstitutional for the following reason. Whereas Article 22 of the Constitution permits the restriction of the freedom of business activities for the reason of promoting public welfare, the public welfare must be expressed in the form of legislation. The legislation in question here is the Control Law, and the basic nature of this law is expressed in Article 1 in which the objective of the law is declared as the maintenance of the balance of international payments and the promotion of sound development of international trade.

The court reasoned that, as expressed in Article 1, the objectives of the Control Law were of an economic nature but the refusal to grant an approval to export the products in the case in question was based on the COCOM agreement whose purpose was to prohibit and restrict the exportation of strategic products to Communist countries in order to slow down the military build-up in those countries. In the opinion of the court, this objective was of a political or strategic nature but not of an economic nature as envisaged in Article 1 of the Control Law.

Therefore, the court held that to refuse to grant an export approval for the purpose of implementing the COCOM agreement was not included in the scope of the Control Law and, consequently, the MITI was not authorized to prohibit the export of commodities under the Control Law if the purpose of such a prohibition was to carry out the mandate of the COCOM agreement. Therefore, the Tokyo District Court held that the MITI's refusal to grant approval in this case was *ultra vires* and so unconstitutional.

The court admitted that whether or not the export of some

commodities should be prohibited, the implementation of the COCOM agreement was a matter of policy decision and that there could be such a policy decision. However, the court stressed that there must be a clear indication to that effect in the form of legislation if such a policy was to involve the restriction of activities of private enterprises.

The defendant (the government) argued that if the prohibition of export in this case was held to be invalid and could not be enforced, it would be a great disappointment to the Allies, especially the United States. It maintained that if the implementation of the COCOM agreement was frustrated, then there would be repercussions in the United States by way of some retaliation against Japan such as import restrictions or some other economic measures and that, for this reason, the implementation of the COCOM agreement had a strong economic implication. In this way, the government tried to persuade the court that the prohibition of items covered by the COCOM list was within the objective of the Control Law.

However, the court refused to accept this argument by pointing out that the cause-and-result relationship between the non-enforcement of the COCOM agreement in Japan and a possible retaliation by the United States against Japan was too remote and was not sufficient to convince the court of the validity of such an argument.

During the proceedings of this trial, the trade show in China ended and, therefore, the issue of whether or not an injunction restraining the MITI from prohibiting the export of the items in question should be issued became hypothetical. Consequently, the plaintiffs modified their action and asked for the recovery of damages sustained by the prohibition of export under the State Redress law which authorized the recovery of damages sustained by private individuals caused by the wrongful conduct of government officials.

The court denied such redress to the plaitiffs. The ground relied upon by the court was that the State Redress Law required proof of malicious intent or negligent conduct on the part of a government official in order for the injured individual to recover damages. Under the circumstance of this case, the interpretation of the Control Law in this regard had not been an issue. There had been several possibilities for the interpretation of the Control Law. One such possibility being that the Control Law could be used to implement the COCOM agreement. The court reasoned that even if the MITI officials in charge of the enforcement of the Control Law had taken this interpretation and prohibited import, it could not be held that they had acted with malicious intent or through negligence. For this reason, relief was denied.

Even though the relief sought by the plaintiffs in this case was denied and the result was somewhat anti-climactic, the implication of the case is

quite important. It established the legal precedent that there must be clear statutary wording in legislation which authorizes the restriction of private enterprise activities by the government, if such restriction is to be interpreted as within the scope of the public welfare under Article 22 of the Constitution. The above conclusion is nothing but an expression of the principle that the excercise of government powers in restricting activities of private enterprises must be done under the rule of law.

Despite this decision, however, the Control Law was not amended for a long time. The MITI stated that it would object to the interpretation of the Control Law by the Tokyo District Court and continued to use this law to implement the COCOM agreement. In 1979, there were major revisions of the Control Law, and, on this occasion, a new wording was incorporated in the provisions dealing with international capital transactions and trade in services to the effect that they could be restricted for the purpose of 'preserving international peace'. The incorporation of this new wording was designed to expand the scope of the Control Law to include in its jurisdiction restrictions based on international-political and strategic considerations.

Curiously, however, no amendment was made on this occasion to Article 48 of the Control Law which authorized the MITI to impose export restrictions and was used to implement the COCOM agreement. Finally, in 1987, when the *Toshiba Machinery* case occurred and a bill was introduced into the United States Congress[10] which would have imposed sanctions on not only the Toshiba Machinery Company but also its parent the Toshiba Company, the Japanese government moved to amend the Control Law and incorporated a phrase in Article 48 which stated that this law could be used to preserve international peace as well as increasing the penalty for violations of the Law.

The decision of the Tokyo District Court in the *COCOM* case stressed that the objective and character of the Control law should be determined by Article 1 of this law which stated the objective of it. One may argue that, as long as Article 1 has not been changed, the basic objective of the Control Law is unchanged and the constitutional doubt has not been completely wiped out. However, now that there are provisions in the Control Law with regard to international capital transactions, trade in services, and also trade in goods which state that control can be imposed on them when it is necessary to do so to maintain international peace, the authority of the MITI, or the MOF as the case may be, is established to implement export control policies of a non-economic nature such as the COCOM agreement or the United Nations decision.

[10] See, on this subject, US Congress, House of Representatives, Report 100–576, *Omnibus Trade and Competitiveness Act of 1988*, Conference Report to Accompany HR. 3 (1988), 830–7.

C. THE FREEDOM OF BUSINESS ACTIVITIES AND THEIR RESTRICTIONS

An Overview

As mentioned before, Article 22 of the Constitution permits restrictions of business activities if it is necessary for the purpose of promoting public welfare. It has been mentioned already that, under the doctrine enunciated in the decision in the *COCOM* case, such a restriction should be based on legislation. Is there any constitutional constraint imposed on the legislature to enact a law which defines the extent to which legislation can restrict business activities? There are several important Supreme Court cases on this issue, and we will examine the major ones. However, before that, it is useful to review the legal propositions.

There are a variety of laws which restrict business activities. There is diversity in the purpose of such restrictions. Some of them are aimed at controlling business activities for the purpose of maintaining public order and good morals. Prohibitions on the manufacture and sale of narcotics, weapons, obscene literature, and strict licensing requirements for some amusement businesses (such as bars and cabaret) are some examples.

Others are designed to accomplish socio-economic policies, such as the protection of agriculture, small enterprises, or declining industries. As discussed in a later section, there are many laws which promote and protect specific agricultural and industrial sectors.

Again there are some laws which regulate public utilities such as those supplying electric power, gas, telecommunications services, and transportation.[11] Generally there are licensing requirements in such industries and enterprises intending to enter into such areas must obtain a licence from the relevant ministry to begin business. In some laws which regulate such industries, there are provisions stating that, in deciding whether to give a licence to a newcomer, the ministry in charge should consider the supply and demand conditions existing in the industry with the view of not creating over-supply.[12] In considering the constitutional issue, the nature of the law in question must be carefully studied and evaluated.

[11] See e.g. Denki Jigyo Hō (Electric Power Business Law), Law 170, 1964; Gasu Jigyō Hō (Gas Business Law), Law 51, 1954; Denki Tsūshin Jigyō Hō (Telecommunications Business Law), Law 86, 1986; and Dōro Unsō Hō (Road Transportation Law), Law 183, 1951.

[12] e.g. Art. 5(1) of the Electric Power Business Law states that the Minister of the MITI shall not grant a licence to operate an electric power business unless the initiation of such business is suitable in relation to the general demand for electricity.

Major Constitutional Cases Dealing with the Freedom of Business Activities

The *Public Bathhouse* case[13] is one of the important cases in which the Supreme Court dealt with the relationship between a regulatory law which restricted the activities of private enterprises and the freedom of business activities. Involved in this case was the Public Bathhouse Law which required a person who intended to operate a bathhouse to obtain a licence from the prefectural government. It provided that a person who operated a public bathhouse without a licence should suffer a criminal penalty. It provided further that when giving a licence to a new person intending to operate a public bathhouse, the prefectural government could take into consideration the geographical distribution of public bathhouses and that when it was asked to grant a licence to a newcomer in a location in which a new bathhouse would create 'excessive competition' among public bathhouses, the prefectural government could decide not to grant a licence. A person who operated a public bathhouse without a licence was indicted and put on criminal trial.

The defendant argued that the provision incorporated in the Public Bathhouse Law which authorized the prefectural government to regulate the bathhouse business and to attach consideration of the geographical distribution of public bathhouses in a certain area as a condition to a licence contravened Article 22 of the Constitution.

The Supreme Court, however, refused to accept this argument and held that to allow new operators to open new public bathhouses without any control might lead to maldistribution of public bathhouses and excessive competition among them. It argued that this would deprive citizens living in remote places of access to public bathhouses since operators would open new bathhouses only in areas where the population was heavily concentrated and that excessive competition among bathhouses would lower the profit of public bathhouses. It argued further that the lowered profit would mean deterioration of sanitary conditions of public bathhouses, a situation highly undesirable from the public hygiene standpoint. For these reasons, the Supreme Court rejected the argument of the defendant and upheld the constitutionality of the provision of the Public Bathhouse Law in question which required a licence to operate public bathhouses and authorized the prefectural government to attach conditions when granting a licence such as making the licence contingent upon the proper geographical distribution of public bathhouses.

The *Retail Market* case[14] is a case in which the licensing system for building a retail market and leasing space to tenants under the Retail

[13] Decision of the Supreme Court, 26 Jan. 1955, *Keishū*, 9/91 (1959), 89 *et seq.*
[14] Decision of the Supreme Court, 11 Nov. 1972, *Keishū*, 26/9 (1972), 586 *et seq.*

Business Adjustment Special Measures Law (hereafter referred to as 'the Special Measures Law') was challenged as incompatible with Article 22 of the Constitution. Under the Special Measures Law, a person who intends to build a retail market complex and lease it to tenants who operate retail stores must obtain a licence from the prefectural government. A retail market complex under the Special Measures Law is not a large-scale retail market such as a supermarket. It is a building or buildings built adjacent to each other in which small shops (mostly 'Mom and Pop stores'—stores operated by wife and husband without employees) are located.

The pronounced purpose of the Special Measures Law is to prevent 'excessive competition' among small stores and to protect the interests of small storekeepers. For this purpose, the prefectural government is given the discretion to attach conditions to a licence to build a shopping complex. In this sense, the Special Measures Law is a piece of legislation specifically designed to protect the interest of small enterprises.

When the *Retail Market* case arose, the Prefecture of Osaka ruled that a licence to build a new retail market complex would be given on condition that the distance between the existing retail market complex and the newly built complex was at least 700 metres. A complex was built inside the 700-metre range from an existing complex without a licence and store units were leased to tenants. The Osaka Prefecture brought a criminal claim to the prosecutor's office against the person responsible. The defendant was tried for a violation of the Special Measures law, lost in the lower courts, and brought an appeal to the Supreme Court.

The defendant argued before the Supreme Court that the control by the Special Measures Law on the distribution of retail markets was an undue interference with the freedom of business activities protected by Article 22 of the Constitution. The Supreme Court rejected this argument and held the defendant guilty of a violation of the Special Measures Law. The Supreme Court stated that the Special Measures Law was designed to protect small shops from cutthroat competition and, in this sense, it was a piece of law based on socio-economic policy to protect small enterprises. In the view of the Court, the National Diet (the legislature) had the power and ability to investigate socio-economic problems and formulate a policy to deal with them, whereas courts had no comparable capabilities in such matters. Therefore, courts should in principle adhere to the judgment of the National Diet as regards the policy dealing with socio-economic matters and should not lightly pass judgment on the wisdom of a law which incorporated such a policy unless the law in question clearly overstepped the limit of the discretion given to the National Diet or the methods of enforcement used were unreasonable. The Court went on to say that, in the Special Measures Law, there was

nothing which indicated that the National Diet overstepped its discretionary power or the methods of enforcement were unreasonable.

In the *Pharmaceutical Affairs Law* case,[15] the power given to the prefectural government under the Pharmaceutical Affairs Law (hereafter referred to as 'the Pharmaceutical Law') to restrict the distance between existing pharmaceutical stores and a new store was nullified by its unconstitutionality. The Pharmaceutical Law was originally designed to authorize the Minister of Public Welfare to license new pharmaceutical products and related matters. Under the Law, a person who intended to operate a pharmaceutical store had to obtain a licence from the prefectural government, and, under an amendment of the law, the prefectural government was authorized to attach conditions to licensing a new pharmaceutical store.

The Governor of Hiroshima Prefecture enacted a rule to the effect that a new pharmaceutical store must be located at least 200 metres away from any existing pharmaceutical store. This restriction was designed to protect pharmaceutical stores from cutthroat competition.

A person who wished to open a new pharmaceutical store within 200 metres of an existing store applied for a licence but his application was rejected on the ground that the intended establishment was within the restricted distance. The applicant brought a suit against the Governor of the Prefecture of Hiroshima and argued that the said restriction unduly limited the freedom to open a new store and violated Article 22 of the Constitution.

The Supreme Court upheld the argument of the plaintiff for the following reasons. The Pharmaceutical Law is designed to protect and promote public health and safety, and it is not designed to promote a particular socio-economic policy to protect the interests of one group or industry. In this respect, the Pharmaceutical Law is different from the Special Measures Law which is specifically designed to protect the interests of small storekeepers. If the Pharmaceutical Law is characterized in the above way, for the purpose of achieving its legislative objective it is not necessary to impose a geographical restriction on the distribution of pharmaceutical stores.

Today pharmaceutical products are manufactured in large factories, packed there, and distributed to consumers through pharmaceutical stores. In this way, the role of pharmaceutical stores is to pass on pharmaceutical products from manufacturers to the consumers. Generally pharmaceutical products are not mixed or processed at pharmaceutical stores. Therefore, no matter how hard competition among pharmacetucial stores may be, and how low the profit rate of stores is, that does not

[15] Decision of the Supreme Court, 30 Apr. 1975, *Minshū*, 29/4 (1975), 572 *et seq.*

affect the quality of pharmaceutical products since the role of pharmaceutical stores is merely to distribute the products without processing the contents of the products. Therefore, as long as the purpose of the Pharmaceutical Law is to protect public health and safety, the provision in the Law in question which authorizes the prefectural government to attach a condition to a licence for the purpose of protecting pharmaceutical stores should be held as excessive intervention into the freedom of business activities, contrary to Article 22 of the Constitution.

Under the above reasoning, the Supreme Court stated that the provision in question in the Pharmaceutical Law was null and void due to its unconstitutionality. As a consequence, the Japanese government amended the Pharmaceutical Law (as well as some related laws) and deleted the provision which authorized the prefectural government to attach such a condition.

The cases examined above are ones in which the freedom of business activities guaranteed under Article 22 of the Constitution was at issue. The *Forestry Law* case,[16] which will be touched upon in this part, is a case in which the guarantee of private property under Article 29 of the Constitution was at issue. A brief account has been given of Article 29 of the Constitution. This provision guarantees that private property shall not be taken away nor its use restricted by the government unless to do so is necessary to promote public welfare. Therefore, there are similar interpretational problems with regard to Article 29 as there are with regard to Article 22.

The Forestry Law whose constitutionality was challenged was enacted to conserve forest from devastation. For this purpose, a provision in the law provided that when a piece of woodland was owned by a plural number of persons, none of them could ask for his share of the land unless the requesting party owned at least a half of the total land in question. The purpose of this provision was to prevent a piece of land from being segmented out into small pieces owned by a number of individuals and to maintain woodland in large units. The rationale of this legislation was that if a piece of land was parcelled into smaller units owned by different individuals, it would be more difficult to conserve the forest.

A piece of land was owned by several brothers and one of them requested the partitioning of his share. When his request was denied, he brought a suit against the brother who refused. The brother argued that the request could not be granted since the Forestry Law prohibited the partition of a piece of jointly owned woodland unless the party requesting partition owned at least a half of the whole land, and, in this case,

[16] Decision of the Supreme Court, 22 Apr. 1987, *Minshū*, 41/3 (1987), 408 *et seq.*

the requesting brother did not own that much land. The requesting brother argued that the provision of the Forestry Law in question was unconstitutional as it unreasonably interfered with the use of private property guaranteed by Article 29 of the Constitution.

The Supreme Court agreed with the argument raised by the brother seeking the partition of the land and held that the provision in the Forestry Law which provided a restriction on partition of a jointly owned piece of land did not serve the promotion of public welfare and was contrary to the guarantee of private property under Article 29 of the Constitution.

The Forestry Law was a piece of legislation designed to conserve forestry and, therefore, was a law based on a specific economic policy. Nevertheless, the Supreme Court stated that the law could not be justified by legislative discretion. The Court reasoned that if a piece of jointly owned woodland could not be parcelled out to individual owners, then it would deprive the owners of the incentive to exert efforts to conserve the forest. If none of the owners wanted to take care of the forest, then the woodland would deteriorate through lack of care. This would produce the opposite result from what had been intended when the Forestry Law was enacted, and, in this sense, could not be held as promoting public welfare.

The Supreme Court held that there was no reasonable linkage between the objective of the Forestry Law and the provision in question. It also noted that the Forestry Law allowed segmentation of a piece of woodland in different ways and to prohibit segmentation only in cases where joint ownership was involved should be regarded as an unreasonable restriction.

A review of the Supreme Court decisions on the freedom of business activities under Article 22 of the Constitution reveals that there are two doctrines as regards this issue. One is that courts will in principle refrain from passing a judgment on the wisdom and validity of a law which incorporates a socio-economic policy. Included in this category are, *inter alia*, laws whose objectives are to protect and promote small businesses, agriculture, consumers, and any other specific groups in society. This type of legislation may be termed 'policy law' since it is based on policy.

In the view of the Supreme Court, it is the task of the National Diet (the legislature) to decide upon policy and to enact a law which incorporates it, and the National Diet is invested with the powers to investigate, hold debates, and come to a policy decision on the matter. Courts are not a suitable agency to deal with policy matters. Therefore, in the view of the Supreme Court, courts should in principle refrain from examining the validity of a policy adopted by the National Diet and incorporated in a law. Under this doctrine, the judicial review by courts of a piece of legislation is limited to examining whether the law in

question involves a clearly excessive control and the methods used to implement the law are unreasonable. We may call this interpretational doctrine 'the judicial passivity doctrine'.

On the other hand, under the Supreme Court decisions as examined above, courts may (and should) examine the validity of a law when the law in question is based on the need to protect public order and safety. Laws for such purposes include, *inter alia*, those providing a licensing system for products in order to maintain product safety, the level of sanitary conditions, good morals, and any other conditions necessary for the maintenance of a good society. Laws prohibiting the manufacture of weapons, drugs, and other dangerous objects belong to this category also. Such laws are not based on a socio-economic policy to promote a specific group or individuals. They are aimed at maintaining the conditions necessary for the maintenance of a sound and healthy society. The essence of regulation under such laws is to supervise and control the activities of enterprises and individuals for police purposes and, therefore, such laws may be called 'police law'.

The Supreme Court has enunciated the doctrine that if the law in question is police law rather than policy law, then courts should examine the validity of it to see if it contains control above the necessary minimum for the purpose of achieving the objective of the law and that if, as the result of such review, it is clear to the court that the law exerts an excessive control, then the court should hold that law as unreasonably intervening into the freedom of business activities as declared in Article 22 of the Constitution, and unconstitutional. This doctrine may be called 'the judicial activity doctrine'.

This dualism as expressed in Supreme Court decisions seems to have resulted from the Supreme Court's interpretation of the separation of powers. The Supreme Court interprets the separation of powers as the principle dividing and allocating powers of the government into different branches and requiring that each branch respects decisions made by other branches in their own jurisdiction.

It may be observed also that this dualism to some extent reflects the fact that courts in Japan, including the Supreme Court, are not comfortable in handling socio-economic policy matters. The Supreme Court mentions in one of its decisions that it is not equipped with the necessary powers and capacities to decide whether a socio-economic policy is wise or not.[17] This applies especially to economic policy matters.

Although this dualism is, to a degree an inevitable result of the doctrine of separation of powers, we must also state that it causes a paradoxical result. Policy laws are often the result of active lobbying by specific

[17] See the decision cited in n. 14, above.

interest groups. They protect specific groups whose interests may be (and often are) adverse to other groups and to the public in general. Under the judicial passivity doctrine, however, courts should refrain from passing judgment upon the validity of them unless they are clearly unreasonable in their content and methods of enforcement.

On the other hand, police laws are generally those designed to protect and promote the interest of the general public rather than specific groups or sectors in society. In the above constitutional doctrine, police laws are closely scrutinized by the courts and if they are found to have transgressed the necessary minimum limit, they are held as unconstitutional and struck down. This means that police laws whose purpose is to protect the general public are more closely reviewed by courts and held unconstitutional than policy laws whose objective is often to protect specific interests.

The Supreme Court tried to correct this paradoxical situation in the *Pharmaceutical Law* case. As noted before, the Pharmaceutical Law was originally a piece of legislation designed to protect the general public and, under the classification mentioned above, was a police law. Later an amendment was made to this law and a new provision was added which authorized the prefectural government to attach conditions when it granted a licence to operate a pharmaceutical store. This provision for the geographical distribution of pharmaceutical stores was a policy law regulation in substance. However, formally the provision was declared to be a police law regulation, and therefore there was a contradiction between the substance and the form in this amendment. In a way, the National Diet introduced the provision for the protection of specific interests under the subterfuge of protecting the general public and the provision for the geographical distribution of pharmaceutical stores in the Pharmaceutical Law was a policy law type regulation under the disguise of police law.

The Supreme Court recognized this contradiction and held the provision in the Pharmaceutical Law unconstitutional as long as it was a police law regulation. If the legislative intent of the provision in question had made clear that it was planned as a regulation to protect small pharmaceutical stores from cutthroat competition, then the Supreme Court would have had to state that it was compatible with Article 22 of the Constitution since it would have been at the legislative discretion of the National Diet to enact a law protecting small enterprises from cutthroat competition. The hidden purpose of the Supreme Court may have been to remedy the anomaly resulting from the doctrine that a policy law should be generally outside the scope of a close judicial review by utilizing the contradiction involved in the Pharmaceutical Law.

In the *Forestry Law* case, the Supreme Court went one step closer to modifying this paradoxical result. This case was not concerned with

Article 22 of the Constitution but with Article 29 which guarantees private property. However, in Article 29 there is a similar wording to that in Article 22 stating that private property can be restricted only for the purpose of promoting public welfare. Therefore, an analogy can be drawn from this case and applied to situations involving the freedom of business activities under Article 22. As touched upon earlier, in the *Forestry Law* case, the Supreme Court struck down a provision in the law which provided that a piece of woodland owned by a plural number of individuals could not be parcelled out unless the owner requesting partition owned at least 50 per cent of the whole land.

This provision in the Forestry Law was clearly a policy law type regulation since the purpose of this legislation was the protection of natural resources. The Supreme Court held that this provision in the Forestry Law was not appropriate for achieving the purpose of this law (that is, conservation) and held that it was an unnecessary restriction. We may observe that the Supreme Court looked into the substance of a policy law and scrutinized the compatibility between the objective of the law and the substance of this provision.

We should also note that the Supreme Court did not pass a judgment on the wisdom of the conservation policy which lay behind this legislation. It merely examined the usefulness of the provision in question in achieving the purpose of the law. Nevertheless, it should be stressed that we can discern a slight shift of direction as regards the attitude of the Supreme Court when dealing with cases in which the public welfare issue in relation to private enterprise activities is at issue.

1.4 International Trade Agreements

A. DIFFERENT KINDS OF INTERNATIONAL AGREEMENTS

Japan is a party to many multilateral and bilateral international trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the Friendship, Commerce and Navigation Treaty between the United States and Japan. The purpose of this section is to enquire what status international trade agreements have in the context of Japanese law.

In Japanese law, the most formal type of international agreements are treaties. Article 73(3) of the Constitution declares that the Cabinet is vested with the power to conclude treaties with foreign nations. However, the Cabinet must obtain a prior, or if the circumstances demand, subsequent, approval of the National Diet when it concludes a treaty with a foreign nation. If an international agreement is a treaty, it enjoys, under Article 98(2) of the Constitution, higher status than domestic laws. It is

Exhibit 2

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generally agreed that an international agreement is a treaty under Article 73(3) of the Constitution if it affects the rights and obligations of private individuals in Japan.[18] If, therefore, an international agreement contains provisions such as the restriction of an individual's conduct, it is a treaty and must be approved by the National Diet in order for it to have legal force domestically.

If an international agreement is concluded between the Japanese government and a foreign country but the agreement is not approved by the National Diet, then the agreement is regarded as an executive agreement. An executive agreement duly concluded by the Japanese government with a foreign country is part of the Japanese legal order and posesses a certain level of legal effect, even though the status and effect of an executive agreement is somewhat lower than those of a treaty. There will be a detailed discussion of the status and effect of treaties and executive agreements in a later section.

There are many types of international agreements to which the Japanese government is a party. They include: *jōhyaku* (treaty), *kyōyaku* (convention), *kyōtei* (agreement), *torikime* (arrangement), *sengen* (declaration), *giteisho* (protocol), *ketteisho* (act), *kōkanbunsho* (exchange of notes), *kōkanshokan* (exchange of letters), and *oboegaki* (memorandum). Whether an agreement falls under the category of treaties as provided in Article 73(3) of the Constitution or executive agreements depends on the substance of the agreement in question rather than the formal name for it.

Some important international trade agreements have been approved by the National Diet and are, therefore, international treaties. Prominent examples include the GATT, the IMF Treaty, and the World Bank Treaty. The Protocol of Terms of Accession of Japan to the GATT was drafted and signed on 7 June 1955 and approved by the National Diet on 29 July of the same year.

There is no need for an approval of the National Diet with regard to certain international trade agreements. They are: (1) an international agreement concerning technical details of diplomacy, (2) an international agreement concluded to provide for detailed rules of implementing a treaty that has already been approved by the National Diet, and (3) an international executive agreement within the scope of the powers authorized to the Cabinet by legislation.[19]

Often the Executive Branch takes a relaxed interpretation of the requirement for obtaining approval of the National Diet and does not

[18] A comprehensive treatise in Japan on this subject is: Iwasawa, *Joyakuno Kokunaihōteki Kōryoku* (*Domestic Law Effect of Treaties*) (Tokyo, 1985).

[19] See n. 5, above, pp. 83–4.

introduce international agreements into the National Diet for approval on the grounds that they belong to one or other of the categories mentioned above.[20]

Also the Executive Branch takes a view that as long as an international agreement is not self-executing and requires domestic legislation to implement it, the Cabinet need not submit the agreement to the National Diet for approval since implementation takes place through domestic legislation enacted by the National Diet. In 1974, the United States and Japan entered into the United States–Japan Textile Agreement in which the Japanese government promised to impose a quantitative restriction on the export of textile products directed from Japan to the United States. The implementation of this agreement required the restriction of the export of textile products to the United States and, therefore, involved a restraint imposed on individuals' activities. However, this agreement was never submitted to the National Diet for approval.

Questions were posed by the opposition parties in the National Diet about why the agreement had not been submitted to the National Diet for approval. The Director General of the Cabinet Legislation Bureau answered the questions and stated that the agreement in question was no more than an executive agreement which did not directly impose obligations on private individuals and, therefore, there was no need to bring it before the National Diet.[21] According to this rationale, the agreement would have no effects on Japanese exporters of textile products. However, in reality, the government invoked the export licensing requirement under the Control Law and imposed export restraint on the export of textile products to the United States. Again the rationale used by the government was that the government had been authorized by the Control Law to impose such restrictions.

B. TREATY-MAKING POWER

Treaty-Making Process

As stated earlier, the Cabinet has the power to conclude treaties with foreign nations under Article 73(3) of the Constitution subject to the approval of the National Diet. In the language of Article 73(3), prior approval is required in principle and subsequent approval is permitted only exceptionally. In practice, however, international trade agreements are often submitted to the National Diet for approval subsequent to their conclusion. So far there have been eleven cases in which the Cabinet

[20] See ibid. 84–5.
[21] See ibid. 85.

sought the subsequent approval of the National Diet including the Protocol of Terms of Accession of Japan to the GATT.

Under Article 61 of the Constitution, in approving a treaty, the Lower House votes first, and, in cases of disagreement between the Lower House and the Upper House with regard to approving or not approving, the Lower House prevails.

As mentioned before, if an international agreement imposes restrictions on the rights and obligations of individuals, that is, if it changes an existing law, requires enactment of a new law, or abolishes an existing law, then it is necessary for the Cabinet to introduce it to the National Diet and obtain its approval.

Validity of a Treaty and Executive Agreement

The question of the validity of a treaty in Japanese law should be distinguished from that of the direct applicability. The question of validity is concerned with whether or not a treaty has the force of law in Japan whereas that of direct applicability is concerned with whether or not a treaty applies as a law without implementing legislation. Article 98(2) of the Constitution declares: 'Treaties concluded by Japan and established laws of nations shall be faithfully observed.' This provision is couched in generalities and the exact content is not immediately clear. However, it states that the government and citizens are obligated to respect treaties. From this, it follows that treaties are part of Japanese law and have the force of law.

The natural interpretation is that an executive agreement also has the force of law under Article 98(2) of the Constitution. This should be the correct interpretation of Article 98(2) which states that 'established laws of nations' shall be faithfully observed. Established laws of nations means customary international law and Article 98(2) requires that customary international law be faithfully observed. An executive agreement duly concluded by the Japanese government with a foreign nation should be at least equated with established customary international law which consists of cases, practices, understandings, and usages among nations. Compared with customary international law, an executive agreement provides for more formal and clear rights and obligations between the Japanese government and a foreign nation.

Direct Applicability of a Treaty

The question of whether or not treaties are directly applicable is separate from the question of their validity as discussed above. The validity question requires an inquiry into whether treaties are part of Japanese law and have the force of law in Japan. On the other hand, the question of direct applicability of treaties is that of whether treaties are self-executing or not. If a treaty is self-executing, then it can be applied without any

implementing domestic legislation. However, if it is not self-executing, in order for it to be domestically applicable, it needs implementing domestic legislation.

Whether or not a treaty is self-executing is determined by the wording employed, the intent of the contracting parties, and the circumstances under which the treaty came into force. Generally speaking, it should be maintained that treaties are applicable as law in Japan since their observance is mandated by Article 98(2) of the Constitution and, from this constitutional command, it can be inferred that treaties are applicable as law.

However, sometimes there are phrases in a treaty which can be interpreted as not having been intended to be self-executing. If so, the treaty in question should be held as not self-executing. A good example is the decision of the Supreme Court in the *Shiomi* case[22] which was handed down in 1989. In this case, the petitioner was a disabled person who had been naturalized to Japan. She was born in Korea when Korea was part of Japan. Her naturalization took place in 1970. She applied for a welfare pension under the Welfare Pension Law which came into effect in 1959 but was denied for the reason that pensions could be granted only to Japanese citizens and when the law in question came into effect she was not a citizen of Japan. She argued that the International Covenant on Economic, Social, and Cultural Rights (ICESC), to which Japan was a party and which stated in Article 9: 'The State Parties . . . recognize the right of everyone to social security', required the Japanese government to grant pension rights to her.

The Supreme Court rejected the argument of the petitioner on the ground that Article 2(1) of the Convention stated that the member states 'take steps with a view to achieving progressively the full realization of the rights . . .'. This clause indicated that the Convention did not confer a right on individuals but merely imposed an obligation on the member states progressively to take steps to realize the content of the Convention.

In the ICESC, there were clauses which clearly stated that the member states were obligated progressively to take steps to realize the rights of individuals to social security. However, courts may rule that even an international agreement which contains no clear wording indicating that it is not self-executing has no direct applicability.

C. TREATIES AND DOMESTIC LAWS

An Overview

When the requirement under a treaty and that under a domestic law are in conflict, which prevails over the other? This question is directly related

[22] Decision of the Supreme Court, 2 Mar. 1989, *Shomu Geppo*, 35 (1989), 1754 *et seq.*

to that of the applicability of treaties, since no question arises as to whether a treaty or a domestic law prevails when they are in conflict if a treaty is not directly applicable because then there would be no clash between the two requirements or obligations to be reconciled. However, if a treaty is directly applicable and provides for certain rights or obligations and if a law exists which carries conflicting rights and obligations, then one or the other should prevail.

Many commentators in Japan maintain that a treaty should override a conflicting domestic law.[23] Among the reasons given by the commentators, that based on Article 98(2) of the Constitution is probably the most important. Article 98(2) declares that treaties and the established laws of nations shall be faithfully observed. Under this article, treaties are given a special constitutional status as compared with regular domestic laws. From this constitutional provision, it follows that the National Diet is obligated to enact a law which would not conflict with the requirement of a treaty. If the National Diet did enact a law which conflicted with a treaty, then the legislation would be contrary to the constitutional requirement and should be overridden.

However, there is no court decision yet in which a domestic law which was in conflict with a treaty obligation was held invalid for that reason. In the *Jewellery Smuggling* case (1961),[24] the Kobe District Court dealt with a violation of the Customs Law. A foreigner smuggled jewellery into Japan declaring that the jewellery he possessed was his 'personal effects' although in fact it was for sale in Japan. The court found him guilty of evasion of the Customs Law.

The defendant argued that Article 8(3) of the GATT, which stated that the Contracting Party shall not impose a penalty for minor breaches of customs regulations, restrained the Japanese government from imposing any penalty in this case. The court rejected the defence on the ground that the defendant's conduct was more than a minor offence. However, in referring to Article 98(2) of the Constitution, the court stated: 'the principle of faithful observance of treaties . . . is understood to proclaim superiority of treaties [over domestic law].'

The Kyoto Necktie *Decision*

The *Kyoto Necktie* decision is probably the most important decision with regard to the relationship between treaties and domestic laws. There are three decisions with regard to the *Kyoto Necktie* case: the decision of the

[23] See e.g. Sato, *Nihonkoku Kenpo Gaisetsu* (*A General Explanation of the Constitution of Japan*) (Tokyo, 1980), 467–9; Takano, *Kokusaiho Gairon* (*A General Theory of International Law*) (Tokyo, 1969), 84.

[24] Decision of the Kobe District Court, 30 May 1961, *Kakyū Keishū*, 3/5–6 (1961), 519 *et seq.*

Kyoto District Court,[25] that of the Osaka High Court,[26] and that of the Supreme Court.[27] The background to this case is rather complicated, and an account is given below.

Japan was at one time the major producer and exporter of raw silk. However, in recent decades, Japanese raw silk farmers have lost their international competitiveness because of the spiralling costs of production in Japan compared with those in neighbouring countries, especially Korea and the People's Republic of China.

To deal with this situation, the National Diet enacted the Silk Price Stabilization Law which established a price stabilization programme. Under this law and its regulations, the government set upper and lower price limits within which the domestic price of raw silk should stay. When the market price went above the upper limit, the Silk Business Agency (Sanshi Jigyodan, a government corporation) sold raw silk from the stockpile it held and brought the price down to within the predetermined limits. If the price of raw silk went below the lower limit, then the Agency purchased raw silk to make the price go above the lower limit. In this way, the price was manipulated to stay within the predetermined range.

So, under the stabilization programme, the government was authorized to engage in either selling or buying operations depending on the market situation. However, the real problem with which silk growers in Japan were faced was that of over-production and falling prices. Consequently, the main function of the Agency was to engage in the purchase of raw silk and to support of the market price in Japan. If low-priced foreign raw silk had been allowed to enter the Japanese market freely, then the price stabilization programme under the Silk Price Stabilization Law would have been disrupted since the imported silk would have pushed the domestic price below the lower limit even though the Agency bought up domestically produced raw silk.

An amendment was made to the Silk Price Stabilization Law and, under this amendment, the Silk Business Agency was given the exclusive right to import raw silk from abroad. Under the law, the Agency imported raw silk from abroad but was prohibited from selling it in the domestic market when the domestic price was below the price limit described above. When it sold imported silk in the domestic market, it had to sell it at a price within the price band determined by the Minister of Agriculture. Under this price-stabilization programme, the exclusive import of foreign-

[25] Decision of the Kyoto District Court, 29 June 1984, *Hanrei Taimuzu*, 530 (1984), 265 *et seq*.

[26] Decision of the Osaka High Court, 25 Nov. 1986, *Hanrei Taimuzu*, 634 (1986), 186 *et seq*.

[27] Decision of the Supreme Court, 2 Feb. 1990, *Soshō Geppō*, 36/12 (1990), 242 *et seq*.

produced silk by the Agency and the restricted price at which imported silk was sold, meant the price of raw silk in Japan was much higher than the international price of this product. Japanese producers of neckties in the Kyoto area had to use fabrics made of this high-priced raw silk. In Europe, raw silk is not produced and there are no protective measures for raw silk production and imports of raw silk are freely accepted. The price of raw silk in Europe was much lower than in Japan. Producers in Korea and Mainland China exported raw silk to the European countries. European necktie producers produced ties using fabrics made of inexpensive raw silk, and they exported the ties to Japan. Even though 17 per cent *ad valorem* tariff was imposed on imported ties in Japan, Japanese tie producers had difficulty in competing with imported ties from Europe because of the differences in costs.

Tie producers in the Kyoto area brought a legal action in the Kyoto District Court against the government and claimed that their interests were adversely affected by the restrictions on the import and the high price of raw silk. They maintained that this measure of the government protected silk growers at the expense of tie producers, unreasonably restricted the right of tie producers freely to import silk from abroad, and violated Article 22(1) of the Constitution.

The plaintiffs also alleged that the measure was in violation of Article 2(4) of the GATT, which stipulated that whenever a tariff concession under the GATT had been made for a commodity which was an object of state trading, a contracting party should not sell the commodity in the domestic market at a price which was above the actual import price plus tariff, i.e. earn a profit, and in violation of Article 17 of the GATT which required that state trading agencies operate on commercial considerations only in terms of price, quality, and availability. Their argument was that the Silk Business Agency was required by law to sell imported raw silk at the price which was artificially determined by the government and this was contrary to those articles of the GATT, and, since the GATT had been ratified by the National Diet as a treaty, it should override a conflicting law under Article 98(2) of the Constitution.

The Kyoto District Court held that the freedom of business activities guaranteed under Article 22(1) of the Constitution was subject to restriction for the public welfare and that courts should refrain from lightly passing judgment on the wisdom of legislation designed to achieve a socio-economic policy objective. This is nothing but a repetition of the doctrine which had been enunciated by the Supreme Court, as we have already seen in a previous section.[28]

The court also held that the tariff imposed on imported ties protected

[28] See 1.3, below.

domestic producers of ties, that the government could invoke Article 19 of the GATT and take safeguarding measures if the condition of Japanese tie producers had seriously deteriorated, and that, for the above reasons, the plaintiffs had not been disproportionately disadvantaged by the government protection of silk growers.

With regard to the compatibility of the exclusive import system under this law with the GATT, the court rejected the arguments of the plaintiffs and upheld the validity of this law and measure. The court stated that the exclusive right to import and the price stabilization system in this case were designed to protect raw silk producers from the pressure of imports for a while and this had the same effect as the emergency measures permitted under Article 19 of the GATT;[29] that although there should be a limit to the period for the exclusive right to import judging it as an emergency measure, such a limit should be determined flexibly depending on the situation; and that, since this period should be decided in relation to the duration of the pressure of imports, the provision of the law for the exclusive right to import could not be regarded as unreasonable.

As above, the court argued that, as an emergency measure, the exclusive right to import was not incompatible with the GATT which would permit this under Article 19 of the GATT. As long as the exclusive right to import was lawful under the GATT, it was not necessary for the court to decide the effectiveness of the Silk Price Stabilization Law and the exclusive right to import raw silk as a domestic law. However, the court went on to state its position on this matter in the form of a dicta.

The court stated that, following a violation of a provision of the GATT, it would pressure the country to rectify the violation by confronting that country with a request from another member country for consultation and retalitatory measures. However, it further stated that it would have no more power than that and, therefore, it would not necessarily follow that the legislation in question was invalid as a domestic law simply because it was contrary to the GATT.

The position expounded by the court was that a violation of the GATT should be remedied by resorting to the dispute settlement procedure provided in Article 23 of the GATT and that even though a domestic law was contrary to the GATT, it would not be deprived of its legal effectiveness by that reason alone.

The case was taken to appeal in the Osaka High Court which handed down a decision on 25 November 1986. With regard to the issue of whether the exclusive right to import in question was contrary to the freedom of business activities as guaranteed under Article 22(1) of the

[29] Article 19 of the GATT permits contracting parties to take emergency measures to protect a domestic industry from the impact of an increase in imports by way of import quotas or tariffs when a domestic industry is suffering serious injury from it.

Constitution, the Court upheld its compatibility by simply reiterating the doctrine pronounced by the Supreme Court in previous cases.

As to the issue of the compatibility of the exclusive right to import with the GATT and the validity of this law, the Osaka High Court distorted the issue by stating that the appellants argued that the sale price of imported raw silk was contrary to Article 2(4) and Article 17 of the GATT and that the sale price was determiend by the Silk Business Agency on the basis of the standard price established by the Minister of Agriculture. The Court held that the argument of the appellants did nothing but use the action of the Silk Price Agency as the basis for the illegality of the legislation and, therefore, was wrong.

An appeal was taken by the petitioners to the Supreme Court. The petitioners presented a detailed petition. An account of the part of the petition which deals with the relationship between the Silk Price Stabilization Law and the GATT is made below since its contents are relevant to our discussion. The petitioners argued that under Article 2(4) of the GATT, a state trading agency shall not sell imported products in the domestic market at a price above the import price plus the amount of tariff and earned extra profit when the imported product in question is subject to tariff concession under the GATT. Also under Article 17(1) of the GATT, each Contracting Party promises that its state trading agency operates on commercial considerations only. The exclusive right to import is established under Articles 12.13.2 and Article 12.13.3 of the Silk Price Stabilization Law. These provisions of the law are contrary to Articles 2(4) and 17(1) of the GATT and the enactment of those provisions is illegal in that the Diet passed provisions of law which violate the GATT. The petitioners argued that the damage had been caused by this illegal legislation and did not argue that the actions of the Silk Business Agency were contrary to the GATT.

The Osaka High Court, however, was mistaken in its understanding of this legal issue and decided the matter on a wrong basis. If the arguments of the petitioners in the Osaka High Court had been unclear, then the Osaka High Court should have used its power for requesting explanation of the meaning and come up with the correct interpretation of the issue.

The Osaka District Court did not touch upon the question of whether the exclusive right to import and the price stabilization programme violated Articles 2(4) and 17(1) of the GATT and the measures granted under those provisions amounted to a safeguard measure as permitted under Article 19 of the GATT. Article 19 of the GATT permits a safeguard measure when there is an increase of imports due to unpredictable circumstances. However, in this case, an increase of imports of raw silk from abroad had been long anticipated and, therefore, the measures did not satisfy the requirements of Article 19.

Also, Article 19 permits a safeguard measure within the necessary limit and time period. However, the exclusive right to import provides an excessive protection to domestic growers of raw silk and a permanent system for import control. Therefore, such measures cannot be permitted under Article 19 of the GATT.

Moreover, the decision of the Kyoto District Court states that the effect of a violation of a GATT provision is simply that the violating country will be faced with the request for consultation under Article 23 of the GATT or with a retaliation and that there is no legal effect other than this. However, in the view of the petitioners, the measures designed to guarantee the effectiveness of treaty observance are an entirely separate issue from the validity of a domestic statute in violation of the GATT and, therefore, cannot provide the grounds for holding that a domestic law in violation of the GATT is valid.

The Supreme Court handed down a decision in this case on 6 February 1990. The decision consisted of only twenty-five lines and said very little. The Supreme Court briefly touched on the constitutionality of the exclusive right to import under the Silk Price Stabilization Law, cited the previous decisions rendered by the Supreme Court, and noted that, in view of the precedents, the judgment as to whether domestic silk growers should be protected belonged to the realm of legislative discretion which should not be lightly interfered with by courts and that the decision of the National Diet to protect domestic silk growers by means of the price stabilization programme and the exclusive right to import could not be legally challenged unless the law provided protection to one group to the undue detriment to other members of the society or the means for achieving the legislative objective was unreasonable. For this reason, the Supreme Court upheld the decisions of the lower courts.

With regard to the issue of whether or not the exclusive right to import and the price stabilization programme violated articles in the GATT and was, for this reason, invalid, the Supreme Court merely stated: 'In light of the reasoning given by the original court, the judgment of that court can be approved. Therefore, there is no illegality in the decision as claimed by the petitioners.'

An Evaluation of the Case Law with regard to the Relationship between Treaties and Domestic Laws

There is a wide gap between the legal doctrine with regard to the superiority of treaties over conflicting domestic laws propounded by commentators and some court decisions on the one hand, and the consequences of the decisions which deal with this relationship on the other. In brief, treaties are given a very high status in the legal order in the

Japanese legal system but, in actuality, courts have never nullified domestic laws on account of their incompatibility with treaties.

The only court case in which this issue was squarely dealt with is the *Kyoto Necktie* case. In this case, the Kyoto District Court recognized that there was a possibility of conflict between the treaty obligation under the GATT and the domestic regulation incorporated in the Silk Price Stabilization Law. But, after examining the issues, the court held that there was no conflict between the articles of the GATT and the provisions of the law. One of the reasonings given by the court for holding that the exclusive right to import and the price stabilization programme did not violate Article 2(4) and Article 17(1) of the GATT was that the import measures in question could be justified under Article 19 of the GATT, which recognizes the power of Contracting Parties to use import quotas and other import measures temporarily and with compensations to other Contracting Parties when an increase in imports is causing serious injury to the domestic industry producing the same or competing products.

The reasoning of the Kyoto District Court in this regard is hardly persuasive. Whereas Article 19 of the GATT requires that there be serious injury to the domestic industry; that relief measures be temporary, and compensation be granted to other Contracting Parties, the measures provided in the Silk Price Stabilization Law do not require serious injury to be found nor is there any procedure in the law to determine serious injury. The exclusive right to import under the Silk Price Stabilization Law should last 'for a while' but, in actuality, it has lasted since its enactment (i.e. for seventeen years) and there is no prospect of its being revoked. This hardly satisfies the requirement that the relief be temporary. Furthermore, there is no provision for compensation. The Supreme Court could have given a close look at this issue and stated its legal position with regard to it.

The Kyoto District Court further stated that the provisions in the Silk Price Stabilization Law for the exclusive right to import and the price stabilization programme would not be denied validity as domestic laws for the reason that they were incompatible with the provisions of the GATT even if they *were* contrary to those provisions. The reason given by the Kyoto District Court is that the GATT provided in Article 23 as relief to violations of its provisions, that the violating party would be confronted with the possibility of consultation or retaliation, and that relief in the GATT should be sought in this dispute-settlement mechanism.

As argued by the petitioners, however, the simple fact that the GATT provides for the dispute-settlement process does not mean that there should be no remedy in the domestic legal order if a domestic law is in violation of the GATT and a party is suffering from this violation. Moreover, private parties cannot utilize the dispute-settlement process as

provided by Article 23 of the GATT. It is only the government of a Contracting Party which can make use of this process. Viewed in this way, the rationale, used by the Kyoto District Court for denying relief to the plaintiffs, that the remedy provided in Article 23 of the GATT for violations of provisions of the GATT precludes other relief in domestic law is hardly persuasive, since the private plaintiffs could not have utilized the procedure under Article 23 of the GATT. Also, in this case, it was the Japanese government which exercised the restrictions of imports which were alleged to be in violation of the GATT and, therefore, the private plaintiffs could not have petitioned the Japanese government to invoke the dispute-settlement procedure under Article 23 of the GATT. In any event, the Japanese government is not obligated to bring a claim under Article 23 of the GATT even though private parties have petitioned the government to that effect.

As stated earlier, Article 98(2) of the Constitution provides for the supremacy of treaties over domestic laws. Also, as some commentators argue, it follows logically that the National Diet is obligated not to pass laws which contravene treaties and that, if the National Diet does enact a law which violates a treaty, then that domestic law should be overridden by the treaty.[30]

It may be observed that this high constitutional status of treaties may have had the paradoxical effect of inhibiting courts from closely examining the relationship between treaties and domestic laws when they come into conflict and declaring the domestic laws as invalid. And this may have serious political consequences. For example, if the Supreme Court decided that a law setting up the import quotas on agricultural products (say 'rice') was in violation of Article 11 of the GATT and, for this reason, null and void, then all the laws and regulations which establish such quotas or restrictions may have to be held invalid as the matter of domestic law in Japan. Even though this may be a desirable consequence in the long run, the political impact of such decisions is far-reaching and is going to produce strong reactions from interest groups, at least in the short run. Yet the Supreme Court and lower courts may have no choice but to hold that a domestic law in violation of the GATT and other international trade agreements is null and void under Article 98(2) of the Constitution. The only alternative is to avoid the issue.

As examined earlier, there are some court decisions which confirmed the supremacy of treaties over domestic laws but such statements were made as *dicta* and in situations in which courts did not have to invalidate the domestic laws in question. The Kyoto District Court did squarely face the question of whether or not a domestic law was in violation of the

[30] See writings cited in n. 23, above.

GATT and, if so, whether the domestic law should be held invalid. The Court decided against those questions but with dubious reasonings. As we saw, the Osaka High Court distorted the issue and, in effect, avoided facing such questions. The Supreme Court simply did not take up the question.

As we have seen, the petitioners in the *Kyoto Necktie* case brought forth detailed arguments as to the relationship between the GATT and the exclusive right to import and the price-stabilization programme under the Silk Price Stabilization Law, and distinguished the legal points they wished to bring up from the decision of the Osaka High Court. From simply reading the briefs of the petitioners, it is clear that they clarified their positions with regard to this issue. In light of this, it is quite strange that the Supreme Court dismissed the argument of the petitioners simply declaring that there was no fault in the decision of the Osaka High Court. A possible explanation for the attitude of the Supreme Court is that the Supreme Court did not want to take up this issue and wished to avoid answering the question as to whether the provisions in the Silk Price Stabilization Law were in violation of the GATT and, if the provisions were in violation of the GATT, the domestic law effects of such provisions.

D. TREATIES AND THE CONSTITUTION

An Overview (Two Schools of Thought)

The question here is whether the Constitution is superior to treaties or the other way round. This question may look absurd. However, there have been some controversies with regard to this issue. In short, there are two schools of thought. One school, which may be termed 'the treaties supremacy school', holds that treaties are superior to provisions of the Constitution. The school which may be termed 'the Constitution supremacy school' maintains that the Constitution is superior to treaties.[31].

The treaties supremacy school was quite popular shortly after the Second World War and it brings up the following grounds for its validity. Article 98(1) of the Constitution states the supremacy of the Constitution over 'law, ordinance, imperial decree or other acts of the government' and that 'treaties' are not included in this wording. Article 98(2) of the Constitution declares that treaties should be faithfully observed, and so if those two constitutional provisions are read together it would follow that treaties are superior to the provisions in the Constitution. Article 81 of the Constitution empowers the Supreme Court to review the constitutionality of 'law, order, regulation or official act', but here again

[31] Sato, n. 23, above, pp. 467–9.

treaties are not included. This school points out that the basic tenets of the Constitution are 'internationalism' and that treaties which incorporate agreements and consensus should be regarded more highly than the Constitution which incorporates only the consensus in one country.

On the other hand, the Constitution supremacy school bases its beliefs on the following grounds. Article 81 of the Constitution, which provides for the power of the Supreme Court to exercise judicial review on law, order, regulation, or official act, does not explicitly exclude treaties from its scope, and therefore there is reason to infer that treaties are included. Article 98(2) of the Constitution, which declares the obligation faithfully to observe treaties, refers to the domestic legal order only. This may be taken to mean that treaties are supreme over domestic laws but it does not refer to the relationship between treaties and the Constitution. Therefore, this provision does not necessarily exclude treaties from the scope of a judicial review to be exercised by the Supreme Court.

The treaty-making process is similar to the legislative process and, in this sense, treaties are equated with domestic laws. It follows, therefore, that treaties are subject to judicial review as much as regular domestic laws.

Also the amendment process of the Constitution is much more stringent than the treaty-making process. In amending a provision of the Constitution, there must be a National Diet initiative, approval by two-thirds or more votes of all members of the House of Representatives and the House of Councillors, and a referendum. On the other hand, a treaty can be made if the Cabinet concludes it with a foreign nation and the National Diet gives prior or subsequent approval to it—a much lighter requirement compared with the constitutional amendment.

If a treaty is given supremacy over the provisions of the Constitution, then the requirement of a provision in the Constitution can be *de facto* amended easily by concluding a treaty whose content is inconsistent with that of the constitutional provision without resorting to the constitutional amendment process provided for in the Constitution. Important provisions in the Constitution such as the basic human rights provisions could then be changed simply by making a treaty which denies them: an absurd proposition. The above is an outline of the arguments brought up by the school of thought which advocates the supremacy of the Constitution over treaties.

The Sunagawa *Case*

There is no court decision yet in which a treaty was held void due to its conflict with the Constitution. Nor is there any case in which a court exercised the power of judicial review over a treaty in light of the constitutional principles. However, the decision of the Supreme Court in

the *Sunagawa* case[32] is relevant here, and an account is made of this case below.

Based on the Security Treaty between the United States and Japan, the governments of both countries entered into the Administrative Agreement (the Status of Forces Agreement). To implement this agreement, the Japanese government enacted a law entitled the Criminal Special Measures Law which made it a criminal offence to trespass on the properties used by the United States Forces in Japan. There was an anti-American demonstration organized by a political group near the Sunagawa Air Base used by the United States Air Force, and some members of the demonstrating group broke into property used by the United States Air Force. They were arrested, tried under the Criminal Special Measures Law, and found guilty. An appeal was made by the defendants and the case was tried in the Supreme Court.

An argument was put forward by the defendants that the Security Treaty, which was the basis of the Administrative Agreement and the Criminal Special Measures Law, was contrary to Article 9 of the Constitution, which renunciated war as a means of settling international disputes, and was void.

The Supreme Court held that it would not exercise its power of judicial review over the Security Treaty since this treaty was highly political in nature. Therefore, as far as the solution of this particular case was concerned, the Supreme Court relied on 'the political questions doctrine' and stated that the Supreme Court was barred from reviewing the treaty in light of its constitutionality. However, there is an important phrase in its decision which implied that the Supreme Court *would* in certain circumstances exercise its power of judicial review over the constitutionality of a treaty. It stated: 'The Security Treaty . . . must be regarded as having a highly political nature. . . . Consequently, the legal decision concerning its constitutionality has a character unsuitable in principle for review by the Supreme Court, *unless its unconstitutionality or invalidity is obvious*' (emphasis added).

It is generally understood that, in this decision, the Supreme Court admitted in the form of a *dicta* the possibility that a treaty could be reviewed regarding its unconstitutionality if its unconstitutionality or invalidity was obvious. What the circumstance is under which such a review can be made is not clear yet. This question is still open to future determination. However, this statement of the Supreme Court seems to reinforce the position of the Constitution supremacy school as opposed to the Treaties supremacy school.

[32] Decision of the Supreme Court, 16 Dec. 1959, *Keishū*, 13/13 (1959), 3225 *et seq.*

E. JUDICIAL REVIEW OF TREATIES

According to the preceding discussions, the Supreme Court and lower courts can exercise judicial review on treaties on certain occasions. Since, in the judicial review process, treaties are equated with laws, the grounds for judicial review would be similar to those which are used in reviewing regular domestic laws. Generally speaking, therefore, courts examine whether provisions in a treaty violate constitutional principles. In the realm of economic regulation, the relevant constitutional principles include, *inter alia*, the freedom of business activities (Art. 22(1)) and the guarantee of private property (Art. 29). The same principles apply here as those which are applied when examining the relationship between the constitutional principles and domestic laws.

As we have already examined, there are two principles which have developed from previous Supreme Court decisions on this matter: when the domestic law in question is 'policy law type', then courts examine closely whether the law in question does not exceed the necessary minimum regulation and, if it does, courts do not hesitate to hold it as unconstitutional. On the other hand, if a law is 'policy law type', then courts in principle refrain from passing a judgment on the wisdom of the legislation and from holding it as unconstitutional, unless the law in question clearly provides an excessive control or the methods employed are unreasonable.

In treaties concerning international trade, it is possible to identify those two types of agreements. One of them is that type of international trade agreement in which measures based on socio-economic policies are incorporated and the other is where measures for public order, safety, maintenance of health, and related matters are included. If a treaty belongs to the former type, then the scope for judicial review is rather limited, whereas courts can exercise wider powers on a treaty which incorporates measures of 'policy law type'.

1.5 Different Regulatory Methods

A. THE LEGAL FRAMEWORK FOR ECONOMIC PLANNING

Programme Laws

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Exhibit 3

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diverse. It would be impossible to undertake a thorough survey of all the legal areas. Nor would it be very meaningful to present an encyclopaedic picture of all the laws in Japan which are used as instruments to achieve government objectives. We must be satisfied with an illustrative study of them rather than an exhaustive one.

Economic policies can be achieved through legislative or non-legislative means. They can be carried out either by legally binding means on individuals or means which are more informal and non-binding. Generally speaking, legislation is deeply involved in many aspects of economic policies—in areas such as monetary policy and fiscal policy, for example, with laws which authorize market operations. The Bank of Japan is the central agency employed to carry out government monetary policy and the Bank of Japan Law,[33] which established the Bank and bestowed on it the power to engage in selling and buying operations, provides the basis for this policy. Laws which exempt, reduce, or increase tax burdens on some economic activities in order to float the economy so that it can recover from recession or to restrain the economy from overheating, form the basis of government fiscal policy.

Among those laws which provide the basis of the economic policies of the government, are laws called 'the basic laws'.[34] They are economic policies embodied in the form of law. They require the government to formulate concrete measures in a specified area, enact the necessary laws to implement them and to carry them out. The Small and Medium Enterprises Basic Law,[35] the Agricultural Basic Law,[36] the Environmental Protection Basic Law,[37] and the Consumers Basic Law[38] are important examples of such laws. They set up the framework for specific economic, industrial, and social policies. When the government has decided that the creation of a system for promoting an economic goal (such as the promotion of small and medium enterprises) is necessary or desirable, then it establishes the basic framework for the policy in the form of a law. This type of law may be termed 'framework law'.

'Framework laws' are not binding on individuals as such and are not enforceable through the courts. Moreover, private individuals cannot use provisions incorporated in such laws to bring actions against the government for not putting the mandates of the laws into practice. Yet such laws are more than a mere declaration of policies. They require the government to implement the programme contained in them. It is not clear what

[33] Nihon Ginkō Hō, Law 17, 1942.
[34] In Japanese it is called 'kihon hō'.
[35] Chūshokigyō Kihon Hō, Law 154, 1963.
[36] Nogyō Kihon Hō, Law 127, 1962.
[37] Kōgai Taisaku Kihon Hō, Law 132, 1967.
[38] Shōhisha Hogo Kihon Hō, Law 78, 1967.

the legal consequences might be for non-performance of the requirements. Non-performance would probably not create legal liability on the part of the government. However, since the contents of the policies are contained in the form of law, they are regarded as being of a higher ranking than mere policy statements. If the government neglected the mandate of such a law for a long time, it would certainly incur serious political opprobrium.

Since such laws provide 'legal programmes' for the government to put into practice, they are sometimes called 'programme laws'. In the pages that follow, we will limit ourselves to examining the basic laws which have bearings on business activities, namely, the Small and Medium Enterprises Basic Law and the Agricultural Basic Law.

The Small and Medium Enterprises Basic Law

This is one of the most important programme laws and we will briefly review the contents of it. Enacted in 1963, it provides the framework of governmental measures to promote the interests of small and medium enterprises. Article 1 of the law states that it is designed:

> to provide remedies to economic and social limitations surrounding small and medium enterprises, to promote their self-help efforts, and to improve their productivity and terms of trade with the view to rectifying the differences in the productivity among enterprises as well as contributing to the raising of the economic and social positions of employees of small and medium enterprises.

In order to accomplish this basic objective, the law provides: (1) a definition of small and medium enterprises, (2) government policies, and (3) legal measures. 'Small or medium enterprise' in this definition is an entity whose employees number 300 or fewer with capital of 100 million yen or less. Governmental policies towards small and medium enterprises are stipulated in Article 3. Included in the governmental policies are the modernization of facilities, the promotion of research and development, and the introduction of modern management techniques and related matters. Article 5 of the law states: 'The government should take necessary legal and financial measures in order to accomplish the measures provided for in Article 3.' From this structure, we can see that this law does not provide the details of governmental measures as such. It provides the basic legal framework within which the government is required to take the necessary steps.

The government has enacted more than twenty laws to promote and protect small and medium enterprises within the framework of this law. Details of those laws and their actual enforcement are touched upon in a latter chapter.[39] Such major laws fall into the following categories:

[39] See Chap. 4, 4.5, below.

1. Laws designed to provide financial assistance through loans at a preferential rate and providing guarantees for loans.

2. Laws which authorize enterprises to organize themselves in the forms of co-operatives and associations thereby creating economies of scale for operations and providing a countervailing power to larger enterprises when they are engaged in transactions with them.

3. Laws designed to facilitate research and development by authorizing research associations and providing financial assistance.

4. Laws providing for adjustment assistance in the form of, *inter alia*, funds when enterprises decide to shift from the business area in which they are engaged to a new area.

5. Laws protecting enterprises from abusive conduct by large enterprises when they supply parts and components to them as subcontractors.

6. Laws securing business areas by restricting the entry of large enterprises (such as the Large-Scale Retail Stores Law which restricts the entry of supermarkets into local markets).

The Agricultural Basic Law

The Agricultural Basic Law was enacted in 1961 and it formulates the basic agricultural policies which the government should pursue. In its Preamble, it recognized that Japanese agriculture is in difficulties since there is a wide gap between the agricultural and the industrial sectors in terms of productivity and the standard of living of workers in favour of the industrial sectors, and that the work-force is shifting from agriculture to industry. It states that the objectives of the law are to promote agriculture through modernization and rationalization.

This law is divided into: (1) the general rules (Arts. 1–7), (2) agricultural production (Arts. 8–10), (3) pricing and distribution of agricultural products (Arts. 11–14), and (4) the improvement of the structure of agriculture (Arts. 15–22).

Article 1 states that the government should adopt measures to rectify the disadvantages which agriculture has incurred from natural, economic, and social limitations, to promote productivity in agriculture with a view to correcting the differences between the agricultural and industrial sectors in terms of productivity, and to raise the income of workers in agriculture. In order to achieve this purpose, Article 2 stipulates some specific objectives such as: (1) the selective expansion of agricultural production, (2) the increase of productivity by way of the development of land and water, and related matters, (3) the increase of the scale of farm operations, (4) the improvement of the distribution of agricultural products, (5) the stabilization of prices of agricultural products and the maintenance of the income of those engaged in agriculture, (6) the rationalization of the distribution of agricultural tools and the stabiliza-

tion of their prices, (7) the education of those who will be engaged in agriculture, and (8) the promotion of the welfare of those engaged in agriculture by means of improving transportation, sanitation, and working environments.

Article 6 obligates the government annually to report to the National Diet the trends in agriculture and measures taken by the government concerning agriculture.

Under Articles 8 and 9, the government must make a forecast of the demand and supply with regard to major agricultural products, announce it, and take the necessary steps to increase, on a selective basis, agricultural productivity, and total agricultural production.

The price stabilization programme is stipulated in Article 11 which states that the government should take the necessary measures to stabilize the prices of agricultural products. Also the government should encourage improvement programmes engaged in by agricultural co-operatives. Important among the measures stipulated is import restriction. Article 13 of the law states that, whenever the prices of agricultural products are conspicuously depressed by the import of competing products and the production of such products may be hampered due to the decline of the price, the government should restrain the import of such agricultural products by raising tariffs or by imposing quantitative restrictions.

As seen above, the Agricultural Basic Law only sets out the general outline of the agricultural policies which the government should pursue. There are several dozen laws which put them into effect. It is probably not very useful to enumerate all those laws, so we will only note a few of the most important ones.

The Agricultural Land Law[40] establishes rules with regard to the ownership of agricultural land. The basic purpose of this law is to establish the system in which each farmer owns his/her own land and cultivates it. Recently, however, the regulation of this law has been relaxed a little to allow the leasing of agricultural land so that farmers can engage in agricultural activities on large-scale farms. The Agricultural Co-operative Law[41] provides for co-operatives and associations in which farmers organize themselves and engage in joint purchasing, selling, research, and other related matters. The Agricultural Central Fund Law[42] establishes a governmental financial institution which issues loans and other financial assistance to farmers at preferential interest rates. The Foodstuffs Control Law[43] provides for the purchase and selling of rice and the prohibition of

[40] Nochi Hō, Law 229, 1952.
[41] Nōgyō Kyōdō Kumiai Hō, Law 132, 1947.
[42] Nōrin Chūo Kinko Hō, Law 42, 1923.
[43] Shokuryō Kanri Hō, Law 40, 1942.

rice imports. There are similar laws in the areas of fisheries and the fishing industry.

B. MASTER PLAN BY THE GOVERNMENT

From time to time the government sets up a general framework for a specific industrial sector in which private enterprises are urged to formulate their own business plans. In such cases, the government acts as the formulator of a master plan within which private enterprises make specific business plans. Some examples are given below.

The Petroleum Business Law[44] is one such example, and we will briefly look at this law and its operation. The Petroleum Business Law, which was enacted in 1962, is the basis of the petroleum policy of the Ministry of International Trade and Industry (the MITI). One of the basic objectives of the petroleum policy is to import crude oil from abroad and refine it in Japan. Another objective is to ensure the 'stable' supply of petroleum products.

Under the Petroleum Business Law, the Minister of the MITI is required to formulate 'the stable supply plan' for petroleum products and implement it. The Minister formulates a programme for the supply of petroleum products for the next five years based on a forecast of demand and supply of the products. The aim is to avoid over-production and consequent depression of prices. To achieve this objective, it is necessary to control production in some way.

Since it is private enterprises which import crude oil and produce petroleum products, government tools forcing private enterprises to go along with government policies are required. For this purpose, the law provides that the Minister of the MITI has the power to license the building of refining facilities. Any enterprise which intends to establish a new refinery must obtain a licence from the MITI before it can do so. The MITI utilizes this licensing power to control the increase of production facilities in private enterprises. Another provision enforces enterprises engaged in the production of petroleum products to report to the MITI their plans for production.

The law also gives the MITI the power to recommend to private enterprises that they change or modify their production plans, thus ensuring that the industry reduces total production when over-production is anticipated.

A combination of the above is used effectively to control production. Enterprises file their production plans, and, if the MITI finds that their plans, if carried out, would cause over-production, it invokes the power

[44] Sekiyugyō Hō, Law 128, 1962.

to recommend modification or change of production plans. The fact that the MITI possesses the power to license the building of refineries is a strong weapon for the MITI to exert an influence over the industry.

What is interesting in the above regime is that an informal, rather than a formal and legalistic, means is used to implement the policy. In actuality, however, the MITI has never utilized this recommendation power. The MITI has always used more informal means called 'administrative guidance' to achieve its policy objectives. A detailed examination will be made of administrative guidance in a later section. Here it suffices to state that the MITI has avoided using *formalized* administrative guidance but utilizes an informal administrative guidance to achieve the policy goals.

This law does not authorize private enterprises to agree among themselves jointly to determine the quantity of petroleum products to be produced. In fact, however, such agreements or 'cartels' have been made and have been held as a violation of the Anti-monopoly Law. This will be discussed in a later chapter.[45]

Another similar type of government programme was found in the law concerning structurally depressed industries. This law was in force from 1983 to 1988 and then abolished. It does not exist any more, but it provides a good example of how the government formulates a master plan and private enterprises come up with their own plans within this master plan. In the scheme established by the Structurally Depressed Industries Law, the MITI designated some structurally depressed industries as 'specific industries' and formulated a reorganization plan for each of them in which it indicated the general direction of how to cut back excess facility and to direct the whole industry to more promising business areas. Private enterprises in a designated industry were urged to establish a business co-operation programme in which they agreed on mergers and acquisitions, joint buying and selling and joint venture in production, research and development, as well as related matters.

This business co-operation plan had to be approved by the MITI. The MITI consulted with the Fair Trade Commission when aproving any plan to ensure that it would not run counter to provisions of the Anti-monopoly Law. Enterprises which were engaged in a business co-operation plan approved by the MITI were provided with a guarantee by a fund established by the government with respect to the repayment of borrowings from banks.

In this scheme, the role of the government was to set up a general master plan within which private enterprises made a concrete business co-operation plan for their own betterment. In such situations, the acts of

[45] See Chap. 2, 2.7, below.

private enterprises were private acts as well as being instrumental to the implementation of a governmental purpose.

C. UTILIZATION OF PRIVATE ASSOCIATIONS FOR GOVERNMENTAL POLICIES

Often the government utilizes private initiatives and private associations for the purpose of achieving governmental policy objectives. In areas such as the promotion of small and medium enterprises, sometimes the law authorizes the government to announce a framework within which private enterprises are expected to form associations for the improvement of management, production, or for some other purposes. Such associations are of a private nature in the sense that they are designed to promote the interests of the members. The activities of such associations are usually for the benefit of the members, and, in this sense, they are privately motivated. However, such associations are used by the government to achieve government purposes and, therefore, their activities are not entirely private since they are originally planned by the government and encouraged by the government. Indeed private associations in such situations are a policy instrument for the government. In this way, there is a mixture of government policies and private efforts.

Private associations are often utilized by the government as an important policy instrument for exercising 'industrial policy'. We will review the legal aspects of industrial policy in a later chapter and so detailed examination of this subject will be reserved for that chapter. However, we will briefly note some of the important laws which authorize such private associations.

Articles 667–88 of the Civil Code recognize the right of individuals and corporations to enter into a private association or to form a co-operative. However, an association or co-operative formed under the Civil Code is seldom used as a policy instrument. Beside the Civil Code, there are a number of laws which authorize the formation of associations or co-operatives in specified areas. Associations and co-operatives formed under those laws are private combinations since membership is not compulsory and entry and withdrawal are generally made on the free will of individuals or corporations. However, they are more than purely private combinations since the authorization laws usually specify the purposes and limitations for their activities and often government subsidies are given to such associations.

Private associations are recognized especially in the area of promoting and protecting small and medium enterprises. In this area, the Small and

Medium Enterprises Organizations Law[46] and the Small and Medium Enterprises Co-operatives Law,[47] *inter alia*, provide for associations and organizations for small and medium enterprises. They are designed to organize them into larger business units so as to achieve economies of scale in operations and to acquire countervailing bargaining-powers *vis-à-vis* large enterprises.

In foreign trade, the Export and Import Transactions Law[48] authorizes exporters to enter into an export agreement and also an import agreement. The law also authorizes the formation of export and import associations. Such agreements and associations are expected to restrain 'excessive competition' in exports which may cause trade frictions with the importing countries. Import agreements and associations, which are much less utilized, are designed to allow importers to combine themselves to form coutervailing powers to exporters in the country of export when the export trade in the country of export is monopolized by the government or private enterprises in the form of an export cartel.

Also in areas such as agriculture, fisheries, insurance, and research and development, similar associations and co-operatives are allowed. Some of them will be dealt with later.

C. LICENSING OF BUSINESS ACTIVITIES

Two Types of Licensing

Business activities are subject to licensing by the government for a variety of reasons. Some are subject to licensing because of the public nature of the business or the need for supervision. Such licensing powers are vested by law in the national government (usually in ministries) or in the local authorities (such as prefectural governments and their subdivisions).

Traditionally, according to the theory of administrative law, the licensing powers and the laws which authorize the licensing system have been classified into two categories.[49] It has been maintained that, in some business areas which are characterized as highly public in nature, the power to carry out business activities is originally vested in the hands of the government and that private enterprises have no freedom to engage in such business activities. The reason for this monopoly is that the absolute need to provide goods or services to secure the minimum level of

[46] Chūshō Kigyō Dantai Hō, Law 185, 1957.
[47] Chūsho Kigyōtoh Kyōdokumiai Hō, Law 181, 1949.
[48] Yushutsunyū Torihiki Hō, Law 299, 1952.
[49] See Kisugi, *Keizaikatsudō To Hō* (*Economic Activities and Law*) (Tokyo, 1987), 34 *et seq.*

civilized life regardless of profitability, the large requirement for capital investment, the limited demand, and related matters necessitate that the execution of the businesses be entrusted to the government. It has been argued that the nature of the businesses involved is such that the economic performance would be uncertain or inferior if private enterprises were allowed freely to enter into the areas without any government control.

The supply of electricity, gas, and water, and the provision of telecommunications are regarded as belonging to this category. In those areas, however, the government can delegate by licence under law the power to carry out the business to private enterprises. In those areas, the government grants by licence to private enterprises the special 'privilege' to engage in business, and the licence given in such cases is a 'privilege licence'.

The traditional theory holds that there are some other business areas in which private enterprises are originally vested with the right to engage in business but that the government imposes prohibitions on private enterprises to do business for the sake of maintaining public order, safety, public health, and related matters, and, when it becomes clear that an enterprise intending to enter one of these businesses is qualified to do so, and that no harm will be caused to society, the government gives permission to the enterprise to engage in the business. In those business areas, the right to engage in business by private enterprises is temporarily suspended by the prohibition under law and, when the government certifies that an enterprise is qualified to engage in the business, a licence given by the government restores the original right of the enterprise.

For example, in the restaurant business, private enterprises basically enjoy the freedom to engage in business. However, in order to maintain public health and safety, there are requirements in the relevant regulatory law which enterprises intending to do business must meet.[50] Therefore, the law controlling this business prohibits or suspends the right of a private enterprise to engage in business until a licence is given. A licence must be obtained from the relevant authority when an enterprise begins business in this area and the licence confirms that the enterprise is well qualified to operate a restaurant and cause no danger to the public.

In this category, the prohibition by law imposed on business activities and permission granted to enterprises to engage in those activities by licence under law are designed to maintain order in society and this type of regulation is an exercise of police power. A licence of this type may thus be called a 'police power licence'.

[50] e.g. Art. 14(1) of Shokuhin Eisei Hō (The Food Hygiene Law, Law 303, 1950) prohibits anyone from selling specified foods and additives unless tested and permitted by the Minister of Health and Welfare or the Governor of the prefectural, as the case may be.

Licence Granting Privilege to Engage in Business

Examples of business activities in which the power to carry out business is given to private enterprises by a privilege licence are: the supply of water, the postal service, the supply of electricity, public transportation, telecommunications, and some others. In fact, some of the services which belong to this category are supplied by the government itself. The supply of water is one example and the postal service is another. However, since it is not practicable for the government to engage in all such business activities, it delegates the power to operate some businesses to private enterprises by law. The laws which authorize such businesses provide strict requirements which the private enterprises so authorized must meet in terms of capital requirements, conditions for entry into those business areas, withdrawal from the business concerned, and other terms.

The theory holds that, in those business areas, although private enterprises are delegated the power to engage in business, the power is originally vested in the government and it is a privilege (not a right) for private enterprises to enter into those areas. Often-cited examples are business activities granted under the Electricity Power Business Law,[51] the Gas Business Law,[52] the Railroad Operations Law,[53] the Road Transportation Law,[54] and others.

There are several features which are common to all such laws. New entry of enterprises is allowed only when a licence is given by the ministry in charge, and the ministry in charge is regarded as having 'free discretion' to decide whether to grant a licence to a new entrant or not. Often there is a provision in the authorization law that, in granting a licence to a new entrant, the ministry in charge must take into consideration the supply and demand conditions in the relevant market, and, when it seems to the ministry that supply is sufficient or there is a threat of over-supply, it should not grant a licence.

Recently, however, this supply and demand provision has been criticized by commentators who say that it has unduly restricted new entries and that thereby competition in the relevant market has been restrained.[55] There is a slight sign of change in this respect. For example, in the Freight Trucking Business Law,[56] which was enacted in 1990 and replaced that part of the Road Transportation Law which dealt with trucking, there is no provision which states that the Ministry of Transportation

[51] Denki Jigyō Hō, Law 170, 1964.
[52] Gasu Jigyō Hō, Law 51, 1954.
[53] Tetsudō Jigyō Hō, Law 92, 1986.
[54] Dōro Unsō Hō, Law 183, 1951.
[55] See, in general, Kisugi, n. 49, above.
[56] Kamotsu Jidōsha Unsōjigyo Hō, Law 83, 1989.

should take into consideration supply and demand conditions in the trucking business when considering whether to grant a licence to a new entrant. This law abolished a prior-examination system with regard to licensing based on the supply and demand conditions and introduced a post-examination system in which the Ministry of Transportation examines the supply and demand conditions in a particular area after the licence is given. If the Ministry of Transportation finds that there is over-supply of services in a particular area, the enterprises in the area can be restrained from increasing the capacity for services. This is a somewhat more relaxed regulation.

In those areas covered by the laws, a market is not necessarily monopolized by an enterprise. It is legally possible to grant a plural number of licences to operate in one area. However, there often is a monopolistic situation in those areas due to the restriction of the entry of new enterprises by the ministry in charge. Here again there is a trend for change. In the telecommunications area, the business was once monopolized by the Nippon Telephone and Telegram Company. However, now there are several competing companies in the long-distance telephone business.

Under these laws, there is generally a restriction on withdrawal from the market. This means that a withdrawal is subject to approval by the ministry in charge. Also there is usually price regulation of some kind. The most common type of such regulation is that the price charged by enterprises must be licensed by the ministry in charge, as in the Electric Power Business Law. The licensing of price by the ministry is usually based on the principle of fair return; namely that the ministry gives the licence to a price which recovers the cost and yields a reasonable profit.

Recently, in some laws, there is a system of price reporting instead of price licensing. In the Freight Trucking Business Law to which a reference has been made earlier, enterprises engaged in the business are required to file their tariffs with the Ministry of Transportation. Although the Ministry of Transportation has the power to order a change in the tariff filed by an enterprise when it judges that the tariff in question would cause serious problems in the business, enterprises are free to set their own prices, at least in the initial period of their operations.

Often such laws stipulate that there is the duty to supply on the part of licensed enterprises. Therefore, the enterprises cannot refuse to supply services to those who request them. For example, in the Electric Power Business Law, the Gas Business Law, the Road Transportation Law, and others, there is a provision which states that the licensed enterprises must supply services when requested. In this sense, therefore, there is no freedom of contract or freedom to refuse to contract as far as licensed enterprises are concerned.

Police Power Licence

As noted before, there are some business areas in which enterprises are basically free to engage. However, even in those areas, an enterprise which intends to do business must obtain a licence from the government. The purpose of the requirement that an enterprise intending to do business in the area must obtain a licence is to ensure that the enterprise is fully qualified and equipped to do business and to observe the conditions necessary for maintaining public safety, health standards, good morals, and the like. In those laws which provide this licensing system, there are usually legal requirements which enterprises must meet if a licence is to be given.

Many kinds of businesses fall into this category. Examples include, *inter alia*, restaurants, hotels, bars and night clubs, cleaning stores, sports and amusement centres, pawn shops, banking, insurance.

In these areas, the government must give a licence to an enterprise which intends to do business as long as the enterprise meets the requirements since essentially there is the freedom of an enterprise to do business. The licensing law cannot infringe this fundamental freedom. All it can do is to exercise the power to make sure that the applying enterprise satisfies the legal requirements. If the applicant satisfies these requirements, the government is bound to give a licence.

The theory in administrative law states that the government's discretion in those areas is 'bound discretion' or 'restricted discretion', since the government is not free to decide whether to grant a licence or not but is obligated to grant a licence as long as the legal requirements incorporated in those laws are satisfied.

The New Theory

In recent decades, the traditional classification of the regulatory laws into the two types described above has come under criticism from commentators.[57] They maintain that the difference between 'free discretion' and 'restricted discretion' is at best a matter of degree and not that of kind. Even in the areas in which the government enjoys 'free discretion' to grant a licence to a business or not, the government is bound by the language of the relevant law and so does not have complete freedom as to whether to grant a licence or not. On the other hand, in the areas in which the government's discretion is restricted, the provisions of the law which set forth the licensing requirements may be couched in broad terms and, through interpretation, the government may, in fact, possess some discretion. Commentators argue that the dualism which the

[57] See, in general, Kisugi, n. 44, above.

traditional theory maintains is unrealistic in the light of the present economic regulations.

Commentators also maintain that nowadays there are many regulatory powers of the government which do not belong to either of these types. For example, the regulation under the Petroleum Business Law (to which reference has been made) does not incorporate a licence for the privilege to do business. Nor does it incorporate the power of the government to grant a licence for the maintenance of public order, good morals, and health standards.

Likewise, under the Large-Scale Retail Stores Law,[58] which provides for the restriction of new entry of large-scale retail stores (like supermarkets), the power of the government cannot be classified as either one or the other. In those new areas, the purpose of the regulation is to achieve policy objectives or to reconcile conflicting interests.

It is true that laws which belong to this middle ground are increasing tremendously in number and the traditional dualism is quickly becoming obsolete. Perhaps it is better to examine each piece of legislation on its own merits rather than to apply abstract criteria indiscriminately.

D. FORMS OF GOVERNMENT ORDERS AND REGULATIONS

Under some laws, the government is authorized to issue an order that commands the party to whom it is addressed to refrain from doing something (such as refraining from using materials which would cause environmental pollution) or to perform something (such as paying administrative fines). Government orders issued by the Executive Branch are generally called 'administrative dispositions' whose enforceability is usually backed up by the criminal penalty which will be imposed on the violating party.

In the areas of economic regulation, laws often state the general principles and delegate the authority to enforce them to administrative agencies through Cabinet decrees and ministerial orders. The Cabinet enacts Cabinet decrees, and administrative agencies (often ministries) are empowered to promulgate the regulations and issue orders (administrative dispositions) to enforce the content of the law and the Cabinet decrees. Often ministries announce guidelines in which the ministry shows its own interpretation of the law and regulation.

For example, under the Foreign Exchange and Foreign Trade Control Law,[59] Cabinet decrees entitled 'the Foreign Exchange Control Decree'[60]

[58] Daikibo Kouri Tenpo Hō, Law 109, 1973.
[59] Gaikoku Kawase Oyobi Gaikoku Bōeki Kanri Hō, Law 228, 1949.
[60] Gaikoku Kawase Kanre Rei, Decree 260, 1980.

and 'the Foreign Investment Control Decree'[61] authorize the Ministry of Finance to issue regulations in areas such as foreign exchange control and foreign investment control. The MOF has issued many ministerial orders which implement the details of the law and decrees.

In some laws, the administering authority is empowered to issue 'recommendations' prior to resorting to an order. For example, in the Large-Scale Retail Stores Law, the MITI or the prefectural government, as the case may be, is authorized to issue a recommendation to a large store which intends to make a new entry into a local market to put off the time of entry or to reduce the floor space of the store if it judges that new store would endanger the business of existing small shops in that local market, before resorting to an order commanding the large store to abide by it. As will be touched on in more detail, the Fair Trade Commission (FTC) can issue a recommendation to the party which is suspected of a violation of the Anti-monopoly Law advising the party to cease and desist from the conduct in question. If the party accepts the recommendation, then the FTC can enter a decision without a hearing or trial. If not, usually an administrative proceeding is initiated.

Other laws provide for a different way of enforcement. In the Law to Provide for Emergency Measures to Stabilize National Life[62] which was enacted in the Oil Crisis to cope with sky-rocketing prices, it is provided that the government can announce 'the standard price' for a designated commodity. This is the maximum price above which no enterprise is supposed to sell. However, any enterprise which sells the designated commodity above this standard price is not punished by criminal penalty. The only remedy provided is the publication by the government of the name of the enterprise in violation. This is a device to control the conduct of enterprises through bad publicity.

E. RECOURSE AGAINST THE GOVERNMENT

What kind of remedy is available when the person to whom an administrative disposition is directed wishes to challenge it? We will touch briefly on the general laws on this matter. Under the Administrative Appeals Law,[63] a person to whom an administrative disposition is directed may appeal to a higher office in the administrative agency which has issued the disposition and request a review of it. For example, if the Customs House issued an order to block the entry of a commodity in to Japan by reason of a violation of a law, the importer could bring an appeal to the higher office in the MOF to which the Customs House belongs.

[61] Tainai Chokusetsutōshi Nikansuru Seirei, Decree 261, 1980.
[62] Kokumin Seikatsu Antei Kinkyusochi Hō, Law 121, 1973.
[63] Gyōsei Fufuku Shinsa Hō, Law 160, 1962.

The Administrative Cases Litigation Law[64] provides for the right of an individual to bring a suit in court against the government when he/she feels that a disposition by the administrative agency has adversely affected his/her interests. Under this law, the requirement for standing to sue must be satisfied. This means that the person who brings a suit against the government must show that his/her legal interests are adversely affected by the disposition in question. Court decisions have interpreted this standing narrowly and generally the right to sue the government is limited to the person to whom the administrative disposition in question has been addressed. Although there may be a third person whose interests may have been adversely affected by an administrative disposition directed to a person, the standing to sue is not likely to be granted to that third person.

A famous decision which has some bearings on this issue is the *Juice Representation* case.[65] In this case, the FTC approved of a fair competition code entered into among producers of juice. Under the Law Prohibiting Unreasonable Premiums and Unreasonable Representation,[66] the FTC is empowered to approve of a fair competition code concluded among enterprises which contains rules regulating the contents of representations of the products in question or the amount of premium which is offered with sale of the products. In this case, producers of juice concluded a fair competition code which stated that they would use the representation which merely said 'coloured by synthetic additives' to represent juice which did not contain any fruit juice rather than saying 'without fruit juice'. This code was approved by the FTC. The Housewives Union and also the President of the Union initiated proceedings in the FTC arguing that the approval (an administrative disposition) was likely to mislead consumers and should be withdrawn.

The case was tried first in the FTC. The FTC denied the claim of the Union and the President on the ground that they did not have the standing to bring the case before the FTC since the law in question was not designed to protect each individual consumer, and the administrative disposition in question (the approval of the representation) did not deprive each consumer of any legal benefit which the law should provide. This decision of the FTC was approved in the Tokyo High Court and also in the Supreme Court.

The *Novo* case,[67] in which the issue was whether or not a foreign party to an international contract could bring an action against the FTC when the FTC issued an order commanding the domestic party to the contract

[64] Gyōsei Jiken Soshō Hō, Law 139, 1962.
[65] Decision of the Supreme Court, 14 Mar. 1978, *Minshū*, 32/2 (1978), 211 *et seq.*
[66] Futō Keihinrui Oyobi Futō Hyōji Bōshi Hō, Law 134, 1962.
[67] Decision of the Supreme Court, 28 Nov. 1975, *Minshū*, 29/10 (1975), 1592 *et seq.*

to cancel it on the ground of its illegality under the Anti-monopoly Law, is another important example of how courts would deal with this issue. The Supreme Court ruled that the foreign party did not have the standing to sue the FTC.

In principle, all suits must be brought in regular courts. There is no general administrative court which exists side by side with regular judicial courts. However, in some specific areas there are specialized administrative tribunals. A good example is the Tax Appeals Board to which claims against tax decisions made by the Tax Offices may be appealed. Judicial review is available after the decision of the Board has been rendered.

The State Redress Law[68] authorizes a private individual to bring a tort claim against the government when his/her property has been unreasonably damaged by a tort act of a government official in the course of exercising his/her official power. A remedy is available when the conduct which has caused the damage was done in the course of the exercise of official power. If the conduct was of a purely private nature, then the suit should be directed to the official as an individual. Also, in order for the plaintiff to recover, the illegality of the conduct in question whether in the form of a violation of the Constitution, treaties, laws and regulations, or *ultra vires* must be established, the intent or negligence on the part of the government official must be proved, and also the causal relationship between the illegal conduct of the official and the damage must be established.

In the *COCOM* case,[69] to which reference has already been made, the Tokyo District Court denied a relief to the plaintiffs on the ground that there had been no intention or negligence on the part of the MITI officials who had decided to disapprove the exportation in question even though the court held that the disapproval of the export in question under the Foreign Exchange and Foreign Trade Control Law was unconstitutional for the reason that the law did not authorize the control of export for the purpose of international political or strategic objectives.

1.6 Administrative Guidance

A. DEFINITION OF ADMINISTRATIVE GUIDANCE

No explanation of the Japanese governmental process is complete without some discussions of administrative guidance.[70] Although informal ways of

[68] Kokka Baishō Hō, Law 125, 1947.

[69] Decision of the Tokyo District Court, 8 July 1969, *Gyōsai Reishū*, 20/7 (1969), 84 *et seq*.

[70] For writings in the English language, see the following: Young, 'Administrative Guidance in the Courts; A Case Study in Doctrinal Adaptation', *Law in Japan*, 17 (1984),

carrying out government policies such as administrative guidance are not necessarily unique to Japan, the degree of pervasiveness and the importance of administrative guidance in the Japanese governmental process is probably unique to Japan. In Japan, economic regulations must ultimately be based on legislation as the source of their authority and legitimacy. However, government agencies in Japan often choose not to use laws directly to accomplish their policy goals but to utilize the more informal process of persuasion when they wish to control the conduct of private enterprises. This informal process of persuasion is often called 'administrative guidance'.

Administrative guidance is vague and flexible by its own nature, and, therefore, it is not easy to give a precise definition of administrative guidance. However, a high-ranking official of the Cabinet Legislation Bureau, when asked in the National Diet for the definition of administrative guidance, provided the following:[71]

> [Administrative guidance] is not legal compulsion restricting the rights of individuals and imposing obligations on citizens. It is a request or guidance on the part of the government within the limit of the task and administrative responsibility of each agency as provided for in the establishment laws, asking for a specific action or inaction for the purpose of achieving some administrative objective through co-operation on the part of the parties who are the object of the administration.

The above statement is regarded as an official definition of administrative guidance by the Japanese government. Although this definition is abstract, hard to understand, and susceptible of different interpretations, it does contain several salient features in administrative guidance. (1) Compliance is voluntary. Administrative guidance is not a legal order with penalties for disobedience and, therefore, the party to whom it is addressed has the *legal* freedom of non-compliance. (2) Administrative guidance is a *de facto*, rather than *de jure*, directive issued by government officials and, even if an administrative guidance is issued, it does not make it automatically a legal order. (3) Administrative guidance should, however, be distinguished from the personal conduct of government officials issuing it. It is often an expression of government policy of some kind. (4) In a broad sense, administrative guidance is a form of government regulation which imposes some kinds of rules of conduct on private individuals or enterprises. (5) Even though administrative guidance is informal and has no legally binding power, it is different from a request

120 *et seq.*; Smith, 'Prices and Petroleum in Japan: 1973–1974—A Study of Administrative Guidance', ibid. 10 (1977), 81 *et seq.*; Yamanouchi, 'Administrative Guidance and the Rule of Law', ibid. 7 (1974), 22 *et seq.*; Narita, 'Administrative Guidance', ibid. 2 (1974), 45 *et seq.*; Yoemans, 'Administrative Guidance', ibid. 19 (1986), 125 *et seq.*

[71] Cited in Matsushita and Schoenbaum, n. 7, above, p. 32.

made by an individual to another individual. The relationship between the party requesting (the government) and the party to whom it is addressed is often not equal. In many cases, the government has more bargaining power, resources, and influence than the private individual or enterprise which has been made the object of administrative guidance. (6) In exercising administrative guidance to impose a rule of conduct on private enterprises, the government often represents the consensus of the industry in which the rule of conduct should be enforced. (7) Generally speaking, no precise procedure is required nor is a delineated scope defined. Often administrative guidance is made orally rather than in document form. (8) Administrative guidance is often used before a law is invoked in a situation when the government can invoke the law to impose discipline on the conduct in question. Used in this way, administrative guidance may be a preliminary stage of invoking a law.

B. TYPES OF ADMINISTRATIVE GUIDANCE

Administrative guidance can be classified into different types, among which the following three types seem to be most common: (1) promotional administrative guidance, (2) regulatory administrative guidance, and (3) adjudicatory or conciliatory administrative guidance.

Promotional Administrative Guidance

Often government agencies provide advice to enterprises in order to promote their business activities. In agriculture, the offices of the Ministry of Agriculture and of the prefectural governments operate governmental research institutes and disseminate agricultural technology produced by those institutes to farmers and, when necessary, officials give advice to farmers and assist them to improve production, storage, and processing of agricultural products.

Also, in small and medium enterprise areas, government agencies often render assistance to small enterprises to try to improve their production, management, transportation, research and development, and other matters. Often financial assistance through government financial institutions like the Medium and Small Enterprises Financial Bank, the Commerce and Industries Central Finance Bank, and the People's Bank is given. They issue loans at interest rates much lower than the market rates. Often government officials engage in advising the management personnel of small and medium enterprises, who have borrowed money from those institutions, how to improve their production and other business operations.

This type of administrative guidance can be called 'promotional'

administrative guidance whose main function is to promote or protect enterprises or persons who are recipients of such advice.

Regulatory Administrative Guidance

Often government agencies use administrative guidance to regulate the conduct of enterprises and persons, and, when used in this way, it serves as a substitute for an order under law. There are many examples of administrative guidance of this type, particularly in the area of foreign trade, i.e., export and import controls. However, we will deal with examples of regulatory administrative guidance in export and import controls in a later chapter.[72] Here we will limit ourselves to explaining regulatory administrative guidance in domestic regulation.

A well-known example is that of the *Sumitomo Metal* case[73] in 1965, in which the MITI used administrative guidance to cut back production of steel. In 1965, there was an economic recession and there was a general agreement among the producers of steel to cut back production in order to avoid a further decline in prices. The MITI applied administrative guidance to the steel industry to reduce the amount of steel to a certain level. Most of the companies in the industry complied with this advice and agreed to reduce production. However, the Sumitomo Metal Company was dissatisfied with the quota of production which had been allocated to it and denied compliance.

In those days, the MITI had the power to allocate foreign currency to importers and, without such allocation it was impossible for the company to import the necessary coal and iron ore for production. The company stated that it would bring a legal action against the MITI if the MITI suspended its allocation of foreign currency.

The dispute was finally settled by a compromise between the company and the MITI to the effect that the company would comply with the MITI's request, with some reservations.

Another example is that of the *Price Control* case in 1973.[74] In the year of the Oil Crisis prices in Japan sky-rocketed. The Cabinet decided to establish the price-reporting system in which each ministry would issue directives to enterprises producing products in its charge to report when they intended to raise prices. The ministries often pressured the enterprises to refrain from raising their prices or to reduce the level of price rises. Sometimes ministries set a maximum price above which enterprises could not raise their prices.

[72] See Chap. 3, 3.2, below.

[73] Okumiya, 'The Role of the Administrative Branch in Trade: Government Order and Administrative Guidance Concerning Trade Problems', in Schoenbaum, Matsushita, and Dallmyer (eds.), n. 5, above, pp. 917–121.

[74] Cited in Yamanouchi, *Gyoseishido* (*Administrative Guidance*) (Tokyo, 1977), 37–47.

The government could have invoked the price control decree[75] and fixed the price by law. However, the government decided not to use the price control order because of some questions about the interpretation of the order, and chose instead to use administrative guidance to deal with price hikes.

When used in this way, administrative guidance imposes rules of conduct on enterprises. As long as it is guidance, there is no compulsory power to enforce it in the event of non-compliance. However, government agencies try to utilize different types of persuasion techniques to secure compliance by enterprises.

There are several cases in which a regulatory administrative guidance caused the recipient enterprises to engage in collusive arrangements or cartels. There was an antitrust problem in those cases which will be touched on in a later chapter.

Adjudicatory Administrative Guidance

Government agencies sometimes use administrative guidance to help private enterprises settle disputes among themselves. Of course, legal disputes among enterprises must ultimately be settled by the courts. However, there are disputes which are not suitable for court proceedings and also there is a general desire among enterprises and among the public to avoid confrontation in the courts. For these and other reasons, there is a role for government agencies which belong to the Executive Branch to engage in dispute settlements.

A dispute between enterprises may have some impact on industrial policy matters too, and, in such a situation, the involvement of administrative agencies in mediating the dispute is probably justified as part of industrial policy.

Perhaps the best examples of the role of government agencies in dispute settlement are found in the solving of conflicts between large and small enterprises. As discussed in a later chapter, small and medium enterprises are given various types of protection and promotion due to their sheer number and their importance in the Japanese economy. However, because of a difference in scale of operations and in competitiveness between large and small enterprises, there are many conflicts and disputes between them when they are engaged in competition and also when they are in such transactional relationships as assemblers (like car manufacturers) and suppliers of parts and components (like subcontractors).

In the retail industry, there have been many disputes between supermarkets and small shopkeepers when a supermarket attempts to enter a

[75] Bukka Tosei Rei, Decree 118, 1946. Under emergency circumstances, the government is authorized to establish the maximum price of a commodity.

local market. Small shopkeepers in the locality fear that their business will be seriously damaged when a larger snpermarket enters the market. Similar disputes have arisen in the manufacturing and wholesale industries. For example, in some parts of the food industry such as bean curds and bean sprouts, the undertaking industry, and some light manufacturing industries which have been traditionally regarded as the areas for small and medium enterprises, disputes arise when large enterprises intend new entries.

There are several laws which are designed to deal with such problems. In the retail industry, the Large-Scale Retail Stores Law[76] provides the mechanism for dispute settlements at the initiative of the government whereas, in the manufacturing and wholesale industries, it is the Medium and Small Business Areas Adjustment Law.[77] Generally, in those laws, there is the provision for the government (in the form of the MITI and the prefectural governments) to issue recommendations to parties in dispute to come to terms. However, usually neither the MITI nor prefectural governments utilize this formal power for dispute settlement but engage in a more 'informal' persuasion. For example, the MITI or prefectural governments would informally urge a large supermarket intending to make a new entry into a local market to delay opening a new store or to reduce the floor space so as to mitigate its impact on the existing business of small retail stores in the locality.

In the above situations, the role of the government is that of an informal mediator, advising and suggesting to the parties in the controversy ways of resolving a dispute. This has proved to be effective and many disputes which the parties would never have solved themselves have been resolved without utilizing court proceedings.

C. LEGAL BASIS FOR ADMINISTRATIVE GUIDANCE

As explained earlier, administrative guidance is not a legal action and has no legally binding effect on the party to whom it is addressed. However, administrative guidance is sometimes based on a provision in a law. Sometimes it is authorized by a specific clause in a law and sometimes no such legal basis is found. As noted earlier, even though a law authorizes a government agency to engage in administrative guidance in the form of 'recommendation' and 'warning', the government agency often chooses not to utilize this power but engages in *de facto* advice to the recipient party.

[76] Daikibo Kouri Tenpo Hō, Law 109, 1973.
[77] Chūsho Kigyō Jigyōbunya Chōsei Hō, Law 52, 1982.

Administrative Guidance without a Specific Statutory Authorization

Sometimes government agencies engage in administrative guidance without any specific statutory authorization. The *Sumitomo Metal* case, to which reference has been made, is one such case. In such cases, there is no wording in law which authorizes government agencies to render administrative guidance. Government agencies, especially the MITI, have emphasized that administrative guidance is allowed by 'establishment law' even though there is no specific provision in the authorization law. For example, the Law to Establish the MITI gives general powers and responsibilities to the MITI to supervise specified industries. The law, however, contains no wording which unequivocally sets out the power to give administrative guidance.

Even though administrative guidance is not based on a specific provision in a law authorizing the agency, it creates little problem when it is promotional administrative guidance. In such situations, the recipients of the guidance have little reason to complain since the nature of such guidance is to give benefit to the recipient by promoting its business, providing financial assistance, and so on.

However, if regulatory administrative guidance is utilized without any specific authorization by law, then the validity of it may be questionable since one inevitable aspect of regulatory administrative guidance is to impose a restriction on conduct or prohibition of conduct on the receiving party and, therefore, to infringe upon the rights and freedom of individuals.

Administrative Guidance based on Specific Statutory Language

There are laws which contain a provision that a government agency can issue administrative guidance. The terms used in those laws to describe administrative guidance vary from one law to another. Terms such as 'recommendation' (*kankoku*), 'warning' (*keikoku*), are used. If administrative guidance is issued on the basis of one of these laws, the administrative guidance is a legal act even though there is no power to enforce it by penalty.

The Marine Transportation Law[78] authorizes the Ministry of Transportation to issue a recommendation to enterprises engaged in the ocean freight business to take the necessary measures when it deems that cutthroat competition exists and the sound development of the industry is likely to be impaired. Such measures include agreements among enterprises to limit competition. As we have seen already, in the Petroleum Business Law, there is a provision which states that the MITI can establish the standard price at which the petroleum companies are expected to sell

[78] Art. 32, Kaijō Unsō Hō, Law 121, 1956.

petroleum products. The standard price has no binding power over the companies and is, therefore, a recommendation by the government.

As we have touched upon already, the National Life Stabilization Emergency Measures Law authorizes the government in a state of emergency to set the standard price for commodities designated by the government. Here again, the standard price has no binding effect on enterprises which sell the commodities. Non-compliance incurs only the publication of the names of the non-complying parties. In the Architects Law,[79] the Ministry of Construction is authorized to announce a standard for the fees which architects charge to their clients and recommend it to them.

Aministrative Guidance Combined with Other Promotional or Regulatory Measures

Sometimes, administrative guidance is not based on a provision of law but is combined with other measures to ensure its effectiveness. The Medium and Small Business Modernization Promotion Law[80] and the Agricultural Products Price Stabilization law,[81] which respectively authorize the government agency in charge to give advice to enterprises or farmers with regard to improving their management and operations, provide for financial assistance combined with such advice.

More importantly, however, regulatory guidance may be combined with some legal or extra-legal measures to ensure their effectiveness. The *Sumitomo Metal* case[82] is a case in point. As we have seen, the administrative guidance of the MITI was backed by the power of the MITI to allocate foreign currency to importers. There are many cases in which the MITI advised exporters to engage in 'voluntary export restraint' by way of administrative guidance with the compulsory power incorporated in law as the background. References will be made to those cases later.[83]

In the Large-Scale Retail Stores Law, there is a provision which states that the agency in charge (the MITI or the prefectural government, as the case may be) can issue an order to a large supermarket entering the local market to delay the opening of the store or to reduce the floor space after the agency has issued advice to the same effect and the advice has not been complied with. There is a similar provision in the Medium and Small Business Areas Adjustment Law. In such cases, the agency is required to use administrative guidance in the form of 'advice' before invoking compulsion by law.

[79] Art. 25, Kenchikushi Hō, Law 202, 1950.
[80] Chūsho Kigyō Kindaika Sokushin Hō, Law 64, 1963.
[81] Nōsanbutsu Kakaku Antei Hō, Law 225, 1953.
[82] See Okumiya, n. 73, above, pp. 106–8.
[83] See Chap. 3, 3.3, below.

As noted earlier, the agency, in enforcing those laws, often does not utilize even the provision authorizing it to engage in administrative guidance but exercises a *de facto* administrative guidance. However, even in such a situation, the fact that the government can ultimately resort to the provision in law which would achieve the same purpose if the *de facto* guidance is not respected enhances the effectiveness of the administrative guidance since the agency can utilize it as a tacit threat to make the party comply.

D. EFFECTIVENESS OF ADMINISTRATIVE GUIDANCE

Although the effectiveness of administrative guidance has somewhat declined compared with some decades ago, it is still an important policy tool for the Japanese government. Our enquiry turns to the reasons why guidance is effective. The effectiveness of administrative guidance depends on the types of administrative guidance and the circumstances under which it is made. However, as a general proposition, we can state the following.

When the government engages in administrative guidance, it often reflects the consensus in the industry to which the guidance is applied. An example is, again, the *Sumitomo Metal* case. Administrative guidance is never effective if the industry which is the object of the guidance opposes it as a whole. An important task for the government officials who exercise administrative guidance is to engage in effective persuasion and to create a spirit of co-operation among the recipients of the guidance. Often ex-officials of the government are in key positions in companies or trade associations of the industry to which the guidance is applied and they may play a crucial role in it.

There is a strong desire among the business community to avoid confrontation with the government even if the business community feels that the administrative agency has acted without legal authority in exercising *de facto* control by way of administrative guidance. This somewhat 'submissive attitude' of business communities towards the government may be a factor which makes administrative guidance effective.

When administrative guidance is supported by public opinion as in the cases of price control during the intensive inflation in the Oil Crisis, government agencies often publicize the fact that guidance has not been complied with in the event of non-compliance. In such a case, the effect of publicity is utilized as a technique of control. To give one example, consumer centres attached to local governments receive complaints from consumers regarding defects in commodities, and, when they think those complaints are not frivolous, they advise the manufacturers or vendors of such defective products to replace them with new goods or else take

other appropriate measures to remedy the situation. This advice is not compulsory. However, if this advice is not respected, this is publicized. This has a considerable effect, and, whenever such advice is given, companies usually comply with it without questioning the legal authority behind it.

In view of this, some laws authorize recommendations to be issued by the administrative agencies and provide for publication as the sanction for non-compliance with such recommendations. The Law against Hoarding and Unreasonable Speculation,[84] the Land Utilization Planning Law,[85] and the National Life Stabilization Emergency Measures Law,[86] *inter alia*, all provide for advice to be given by the agencies in charge and for publication of the fact of non-compliance.

The wide range of powers possessed by some agencies may account for the effectiveness of administrative guidance. Although the legal powers of the MITI have declined in recent decades, it still has powers in areas such as international trade, safety and other standards, pollution control, mining and petroleum, electricity supply, gas supply, and industrial properties. The MOF has the power, *inter alia*, to control banking, securities, and insurance as well as to impose taxes. An enterprise with a wide range of operations (which is a feature of enterprises today) is likely to be affected by one or other of those powers possessed by the agency which has the supervisory authority over its activities. The enterprise which has been made the subject of administrative guidance takes into consideration possible consequences at present or in the future of ignoring the administrative guidance and generally judges that to comply with the guidance is a wise business policy.

In foreign trade, enterprises often need assistance from the government when faced with trade conflicts with other nations. For example, if Japanese enterprises are challenged in the United States on account of a violation of United States antitrust laws, they need the support of the Japanese government when they argue in a United States court that the activities in question have been imposed upon them by the government.[87] Also, if Japanese enterprises are unduly discriminated against in a foreign country, the enterprises may wish to complain to the Japanese government and request appropriate action (such as a complaint to the GATT) on the part of the government. Therefore, it is a good policy for enterprises to keep a good relationship with the government and avoid any

[84] Kaishime Urioshimi Bōshi Hō, Law 48, 1973.
[85] Kokudo Riyō Keikaku Hō, Law 92, 1974.
[86] Kokumin Seikatsu Antei Kinkyū Sochi Hō, Law 121, 1973.
[87] The case in point in this context is: *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 US 574 (1986).

confrontation with it. This type of consideration may be another reason why administrative guidance has worked relatively well in Japan.

E. EVALUATION OF AMDINISTRATIVE GUIDANCE

In spite of what has been said above, it must be emphasized that administrative guidance is by no means sacrosanct. It is often effective only if it is based on a consensus within the industry as regards the reasonableness of the guidance. In other cases it is effective only if it is backed up by law. Indeed, the effectiveness of administrative guidance is, in a sense, proportionate to the powerfulness of the agency exercising it. In the postwar period when the economy had been badly shattered by the war, enterprises needed help and assistance from the government, and, under such circumstances, administrative guidance could be very effective. However, now that many enterprises have acquired economic power and independence, they may not need assistance from the government any more. In this situation, the effectiveness of administrative guidance tends to decline. It is probably accurate to say that the golden age of administrative guidance has passed or, at least, is passing.

Administrative guidance can be of great value both to the government and to citizens and enterprises, and there is nothing inherently sinister about it. Administrative guidance, generally speaking, is more flexible than the formal enforcement of law. In emergencies like the Oil Crisis of 1973, economic regulation by law may be too inflexible; it may take too long before a law is invoked, and the scope of a law may be too limited to cope with changing situations. In contrast to the enforcement of law, administrative guidance is much more flexible, and the response of the government to the situation is much more prompt. This should be regarded as the advantage of administrative guidance. Usually negotiations and persuasion are used before administrative guidance is invoked, and economic regulation is accomplished in a more amicable way than unilateral imposition of a legal order by the government which may create tension between the government and business.

However, the advantages of administrative guidance, viewed from a different angle, are also its shortcomings. The flexibility of administrative guidance may mean that its exercise is not circumscribed by any limits. Since, as explained before, administrative guidance can put irresistible pressure upon the addressee, the lack of a clearly defined area within which it can operate may lead to an arbitrary and capricious exercise of *de facto* governmental power and to infringement of individual rights.

Another shortcoming of administrative guidance is a lack of transparency of the process through which it is executed. In enforcement of a law, the procedures are usually provided for in the law, and everyone can see the

process of enforcement. In administrative guidance, however, there is no clearly defined procedure, and even if a compromise is reached between the government and the enterprise which has received the administrative guidance, it may adversely affect the interests of outsiders, and yet there is no standard procedure through which they can raise their objections. Also the general public is deprived of the opportunity of knowing what is under consideration by the government and of participating in the formulation of policy.

In the Structural Impediments Initiative (the SII), a bilateral trade negotiation between the United States government and the Japanese government concluded in 1990, the Japanese government promised to improve the process of administrative guidance by using written documents instead of just oral presentations.[88] The idea involved here is to increase the transparency of the process. Perhaps a law should be enacted which generally provides for the process which the government must utilize when using administrative guidance and in which the rights of third parties to know the contents of administrative guidance and make their views known to the party receiving the guidance and to the government too are fixed.

F. REMEDY AGAINST ADMINISTRATIVE GUIDANCE

By definition, administrative guidance is an informal act of the government and has no binding power on the person receiving it. As such, compliance with administrative guidance is voluntary. As long as administrative guidance remains in such a pure form and non-compliance incurs no legal or *de facto* disadvantage, there is no legal remedy to it. Nor is it necessary to provide a remedy since non-compliance incurs no consequence. As we have seen already, however, administrative guidance is often a substitute for the enforcement of law. Sometimes the receiving party has little choice but to comply with it. If used in this way, it has almost the same effect as an order by law. In such a circumstance, it would be unjust and unreasonable to deny the party to whom it has been applied any relief even though the party has been seriously disadvantaged by it.

Under the Administrative Cases Litigation Law and the State Redress Law, the party whose interest has been adversely affected by the act of a government official can respectively seek for a cancellation of the act in question or for the recovery of damages caused by it. Under both laws, there must be an action by a state official in the exercise of the official

[88] On the SII, see Matsushita, 'The Structrual Impediments Initiative: An Example of Bilateral Trade Negotiation', *Michigan Journal of International Law*, 12/2 (1991), 346 *et seq.*

power of the government which has caused a hardship on the party to whom it has been applied before the party can seek for a cancellation of the action or for the recovery of damages. An administrative guidance is by definition advice of a government official issuing it compliance to which is voluntary for the party receiving it and, to that extent, a legal action in the above laws is not possible, since it is not regarded as an action in the exercise of official power of the government.

However, in exceptional situations, administrative guidance can be regarded as an act of an official in the course of exercising the official power of the government and, therefore, a remedy is available. A case in point is the decision in the *Model Gun* case decided by the Tokyo District Court.[89] Involved in this case was the following set of facts.

A person intended to import a model gun (a toy gun) and sell it. He imported and sold it. The police decided that the model gun in question was a weapon whose importation and sale was prohibited by the Law to Control Weapons.[90] The police could have invoked this law and prohibited the importation and sale of the gun. However, the police chose not to invoke an order by this law but utilized an administrative guidance requesting the party not to import and sell the gun. The police sent the records of the case to the Public Prosecutor's Office and the Prosecutor's Office decided to indict the person for illegal importation and sale of a weapon.

The case was tried by the Tokyo District Court. The court held the defendant not guilty since, after a series of experiments, the court had come to the conclusion that the model gun in question was not powerful enough to be classified as a weapon and, therefore, the importation and sale of the gun did not amount to an importation and sale of a weapon.

Meanwhile the person (the defendant in the criminal trial) went bankrupt and brought an action against the government (the police) on the basis of the State Redress Law. The plaintiff argued that the business of the plaintiff was wrongfully damaged by the administrative guidance which had been based on a wrong assumption that the model gun was a weapon.

The Tokyo District Court held that the plaintif could not recover damages since the plaintiff must prove the malicious intent or negligence on the part of the government official whose conduct had been alleged to cause the damage and there was no proof in this case that the act of the government official (the police officer) was done with malicious intent or negligence.

[89] 23 Aug. 1976, *Kakyū Minshū*, 27 (1976), 493 *et seq*. See, on this case, Matsushita, 'The Legal Framework of Trade and Investment in Japan', *Harvard International Law Journal*, 27, Special Issue (1987), 361 *et seq*.

[90] Jūhō Tōkenrui Shoji Torishimari Hō, Law 6, 1958.

The Tokyo District Court, however, noted in a *dictum* that the administrative guidance in this case was an act in the course of exercising the official power of the government; that is to say, the administrative guidance in this case was a substitute of an official act in the from of legal order. This means that the court characterized the administrative guidance in the case in question as an official act of the government subject to the State Redress Law even if the guidance involved in this case was not an order by law at least as far as the form of it was concerned.

Judging from this case, we can conclude that a remedy in the form of recovery of damage caused by an administrative guidance is available under some specific circumstances. However, this is a limitation to such a remedy. First, in the *Model Gun* case, the administrative guidance was used in lieu of invoking a law when the administrative agency could have invoked the law to prohibit it. In this type of situation, there is a high degree of likelihood that there would be a legal action by the agency if the administrative guidance was not complied with.

As we have seen already, however, administrative guidance is often exercised without any law which would accomplish the same purpose. Often administrative guidance is merely informal advice from the agency. It may indeed have a *de facto* coercive impact on the party to whom it is applied. For example, a subsidy to a person may be withheld if the guidance is rejected by that person. This prospect of withholding a subsidy may be a strong incentive for the party to whom the guidance is applied to obey it. If a causal linkage is established between the rejection of the guidance and the withholding of the subsidy, it is possible for the person to bring a legal action utilizing the rationale stated by the Tokyo District Court in the *Model Gun* case under the State Redress Law that the guidance in question is an exercise of the official power of the government. Often, however, it is hard (or impossible) to establish that linkage and, as long as no such linkage is established, the administrative guidance is nothing but an informal admonition by the government no matter how strong a pressure it may have exerted in actuality, and is not subject to a legal remedy.

Furthermore, adminstrative guidance is often issued orally. For example, a government official merely announces the content of administrative guidance in a private meeting. In such a case, it is hard to prove that there was an administrative guidance.

Recently there have been growing criticisms against excessive use of administrative guidance. As we have touched upon already, one such example is the Structural Impediments Initiative negotiated between the United States government and the Japanese government. The United States government raised an objection to administrative guidance to the

effect that, because of its informality, it lacks transparency, and may lead to an infringement of the due process of law. The Japanese government promised to put administrative guidance in writing, to secure transparency.

In sum, administrative guidance is still a useful tool for the government to use for the variety of reasons mentioned above. However, it is perhaps necessary to bring in a little more 'legalism' in the process. To put it in writing in principle is an improvement in this respect since it increases transparency. It is also necessary to enact a law which establishes some rules for administrative guidance in general, such as the opportunity of third parties to be heard and the remedy which would be available. In Japan, there is no such law as the Administrative Procedure Act in the United States which provides general rules for actions by the United States government. Perhaps there is need for a law of this nature in which some rules on administrative guidance can be incorporated, such as those which require the government agency to publish administrative guidance to guarantee opportunities for third parties to participate in the process in some ways, including presenting their views on it and also to provide some procedure for remedy when the party which has been made the subject of administrative guidance is unreasonably disadvantaged.

Exhibit 3 − 1

Re: ANA Antitrust Issues

I am Mitsuo Matsushita residing in Tokyo, Japan. My major areas of teaching, research and practice are antitrust laws and international economic laws. After earning a Ph.D degree (political science and public administration) from Tulane University and a D. Jur. Degree (law) from Tokyo University, I went on to teach as a full-professor at Sophia University, Tokyo University and Seikei University. I was awarded the title of Professor Emeritus from Tokyo University (1994) and from Seikei University (2010). I taught at a number of foreign universities as a visiting professor including, *inter alia*, Harvard Law School (1977-78), Monash University (Australia, 1980), British Columbia University (Canada, 1981), Columbia Law School (1987-88), Michigan Law School (1990, 91 and 92), College of Europe (Belgium, 1992, 93 and 94), University of Hawaii (1994) and Zurich University (Switzerland, 2004). Currently I am a visiting professor of the Institute of Advanced Studies, the United Nations University.

I have published a number of books and articles in the areas of antitrust laws and international economic laws. A bibliography of my writings both in Japanese and English is attached.

I am a member of the Tokyo Bar (Daiichi Tokyo Bengoshi Kai) and act as a special counsel to the Law Offices of Nagashima Ohno & Tsunematsu, one of the largest international law firms in Japan. I acted as an expert witness in U.S. antitrust cases including *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125 (E.D.Pa., 1980); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *U.S. v. C. Itoh & Co. et al*, 1982-83 Trade Cases at 65,010.

I was one of the founding members of the Appellate Body of the World Trade Organization from 1995 to 2000. During this period, I participated in the resolution of more than 15 trade disputes among WTO member states. In 2006-2007, I acted as the Chairman of the Panel of the World Trade Organization that resolved an international trade dispute between the European Community and Brazil concerning import prohibitions of re-treaded tires, imposed by Brazil for the protection of its environment.

I was a member of a number of councils attached to the Japanese Government, advising government agencies in formulating legislative and executive policies, including the Industrial Structure Council (attached to the Ministry of International Trade and Industry, MITI), the Industrial Property Council (MITI), the Customs and Tariff Council (the Ministry of Finance), the Telecommunications Council (the Ministry of Telecommunications and Post), and various advisory boards attached to the Japan Fair Trade Commission (JFTC). Currently I am a temporary member of the Industrial Structure Council and the Chairman of the Special Committee on Special Customs and Tariffs attached to the Ministry of Economics, Trade and Industry (METI, formerly MITI).

I have been asked by U.S. attorneys representing All Nippon Airways (ANA) in antitrust matters to address certain aspects of the Japanese Antimonopoly Law and the Japanese Aviation Law in the context of international aviation treaties to which Japan is a party. My legal opinion is set out in the following memorandum.

Memorandum

1. The status of international aviation agreements in the Japanese legal order

In order to examine the relationship of government-to-government international aviation agreements and the domestic regulatory system pertaining to aviation in Japan, it is essential to start from a review of Article 98:2 of the Japanese Constitution ("The Constitution"). Article 98:2 of the Constitution declares: "Treaties and the established rules of international law shall be faithfully observed." Generally this constitutional provision is regarded as declaring the supremacy of treaties over domestic laws and regulations when such laws and regulations may be contrary to the treaty terms. Although precedents are not quite unanimous in interpreting Article 98:2 of the Constitution, it is established in the case law jurisprudence that, in the event of conflict between a treaty and a domestic law, the treaty prevails over the domestic law.

In the Jewel Smuggling Case (1961),[1] a foreigner brought into the country jewels by declaring that these were his personal effects. However, in fact, he brought them into the country for sale. When he was indicted for a violation of the Customs Law, he raised a defense that he should not be punished because Article 8:3 of the GATT (The General Agreement on Tariffs and Trade) stated that Contracting Parties shall not punish a minor offense of customs law. Although the Kobe District Court rejected this defense for the reason that the violation of the Customs Law in this instance was not a minor offense, the Court referred to Article 98:2 of the Constitution and stated: "the principle of faithful observance of treaties...is understood to proclaim superiority of treaties [over domestic laws]."

In the Prison Law Case (1996),[2] a person detained in prison who claimed mistreatment by officers of the prison requested the right to counsel to attend an interview. When the Director General of the prison denied this request, both he and his counsel brought a tort claim against the state under the State Indemnity Law and invoked the International Human Rights Convention as requiring Contracting Parties to grant to prisoners the right to counsel. The Tokushima District Court cited Article 98:2 of the Constitution and stated: "Treaties are

[1] Decision of Kobe District Court, 30 May 1961, *Kakyu Keishu* (Lower Court Criminal Cases Reporter), 3/5-6 (1961).
[2] Decision of Tokushima District Court, 15 March 1996, *Hanrei Jiho* (Court Cases Reporter) 1596/115.

accepted as part of the domestic legal order when they are ratified and proclaimed. ...They are applicable to domestic situations without any intermediary domestic legislation and are in a superior position over general domestic laws". The Court struck down the provisions of the Prison Law as contrary to the Convention.

From the above, it is established that international treaties are incorporated into the Japanese legal order and domestic laws, and prevail over any contrary domestic regulations.

2. The Japanese legal framework for aviation

The basic law in Japan for aviation is the Aviation Law (Kōkū Hō, Law 231, 1952, as amended). The purpose of this law is to establish the legal framework for civil aviation in Japan. The legislative intent of this law is declared in Article 1 which states: "The purpose of this law is to develop the aviation business and to promote the public welfare by providing means of securing the safety of aviation and removing obstacles to operation of aircrafts on the basis of provisions of international treaties on aviation and standards, formulae, and procedures adopted as annexes of such treaties." It is to be noted that international treaties and their annexes are mentioned as the basis of the Japanese aviation policy.

Article 105:1 of the Aviation Law requires that airlines engaged in aviation must file tariffs to the Minster of Land, Infrastructure and Transport (hereafter referred to as "the MLIT"). Article 105:2 states that the MLIT can order changes of tariffs if the MLIT judges that the tariffs filed under Article 105:1 are (a) discriminatory to some passengers or cargo shippers, (b) gravely unreasonable in light of the economic and social circumstances and cause serious difficulties to passengers and cargo shippers in using services or (c) tend to cause unfair competition with other airlines operators. With respect to airline operators who engage in international aviation, a special rule is provided for in Article 105:3, i.e., airlines operators who engage in international aviation business must file tariffs with and *obtain approval* of the MLIT. Under Article 105:4, the MLIT must approve tariffs that do not contravene the provisions (a), (b) or (c), and that meet the requirements of international aviation agreements and other international obligations.

Articles 100, 107 and 108 of the Aviation Law provide respectively the powers of the MLIT to (1) license business, (2) approve initiation of operation schedules and (3) approve change in operation schedules. To operate an aviation business, airlines must obtain a license from the MLIT and the same applies when initiating operation schedules and changing them. The MLIT has the power to allocate take off and landing slots to each airline and to control related operational matters.

Article 110 of the Aviation Law provides for the exemption from the application of the Antimonopoly Law of international aviation agreements entered into by domestic and foreign airlines made under the authority of Article 111, Paragraph 1 of the Law, i.e., agreements among Japanese national airlines and other airlines on tariffs and other terms of transportation with respect to transportation between an airport in Japan and an airport abroad and between airports abroad entered into for the purpose of promoting services to the public, provided that the MLIT will not approve agreements that amount to unfair business practices or undue impediments to users due to a substantial restraint of competition in a particular field of trade.

Article 111:1 of the Aviation Law provides that aviation companies must file an agreement as provided in Article 110 of the Law with the MLIT and the MLIT shall not approve such agreement unless it is satisfied that such agreement does not cause undue disadvantage to users, is not unduly discriminatory, does not unduly restrain entry into or withdrawal from such agreement and does not exceed the necessary minimum restrictions.

Another important article is Article 112 of the Aviation Law, which vests with the MLIT the power to issue an order in certain situations. If the MLIT judges that the safety of transportation, convenience of users, or other public interest is impaired, the MLIT can order airlines to (1) change business or transportation plans, (2) change operations and safety rules, or (3) change tariffs (limited to international tariffs). (Paragraphs (4)-(6) are omitted). Importantly Article 112 authorizes the MLIT to order airlines *to change international tariffs* if this is necessary to secure the safety of transportation, convenience of users or other public interests. The Law does not specify details of these items. Presumably, tariffs that are, in the MLIT's judgment, set too high are included within the scope of these items to protect the interests of passengers and cargo shippers. Tariffs set too low (dumping) may cause instability of airfares and disrupt the regularity of operations. Therefore, the MLIT is afforded the power to regulate international air services.

Japan is a party to many multilateral and bilateral international aviation agreements including the Chicago Convention (1944, ratified by Japan in 1953) and bilateral air services agreements with the United States and European and Asian countries. Among those agreements especially important for the purpose of this memorandum is "The Civil Air Transport Agreement between the United States of America and Japan," entered into in 1952 (hereafter referred to as "the ASA"), and made fully effective, by an exchange of diplomatic Notes, in 1953.

Article 73:3 of the Constitution states that the Cabinet is empowered to conclude treaties with foreign nations with prior approval, or if circumstances do not permit, subsequent approval of the National Diet. International agreements duly made through this process are treaties and enjoy the privilege of Article 98:2 of the Constitution which has been discussed above. All of the above mentioned

aviation agreements entered into by participating states including Japan are treaties in the sense of Article 73:3 of the Constitution and, therefore, are given priority over domestic laws and regulations.

The ASA entered into between the United States and Japan is a ratified treaty in the sense of Article 73:3 of the Constitution and enjoys the privilege of Article 98:2 thereof. As stated above, one of the essential elements of the ASA between the United States and Japan is a direct control of rates and tariffs by the government and the stabilization of transport services market between the countries. Under Article 98:2 of the Constitution, the Japanese Government is responsible for implementing the requirements of the ASA between the United States and Japan.

The ASA draws on the Chicago Convention by stating in Article 1 that: "Each Contacting Party agrees that the principles and provisions of the Convention on International Civil Aviation, signed at Chicago on December 7, 1944, applicable to the international navigation of aircraft shall, to the extent to which they are applicable to the air services provided for in the present Agreement, be observed by both parties." Article 13 of the ASA is the key provision, which provides for a direct intervention of aviation agencies both in the United States and Japan to control tariffs. Article 13 states:

> "(A) The determination of rates in accordance with the following paragraphs shall be made at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit, and the rates charged by any other airlines, as well as the characteristics of each service.
>
> (B) The rates to be charged by the airlines of either Contracting Party between points in the territory of the United States and points in the territory of Japan referred to in the attached Schedule shall, consistent with the provisions of the present Agreement, be subject to the approval of the aeronautical authorities of the Contracting Parties, who shall act in accordance with their obligations under the present Agreement within the limits of their legal powers.
>
> (C) Any rate proposed by the airline or airlines of either Contracting Party shall be filed with the aeronautical authorities of both Contracting Parties at least thirty (30) days before the proposed date of introduction; provided that this period of thirty (30) days may be reduced in particular cases if so agreed by the aeronautical authorities of both Contracting Parties."

Article 13 of the ASA between the United States and Japan is unique among the air services agreements between Japan and major nations. The air services agreements that Japan has entered into with major European and Asian

nations generally have required that, where possible, tariffs should be agreed to on a multilateral basis at IATA conferences; where not possible, they should be agreed bilaterally with the other nation's designated airlines; and only in case of dispute should be subject to resolution by the Aeronautical Authorities themselves. The ASA between the United States and Japan, by contrast, provides for the direct intervention into, and regulation of, by the Aeronautical Authorities of both countries, the the tariff's of each country's Designated National Airlines. Hence, the Designated National Airlines providing air services between the United States and Japan are under the duty to file tariffs with both U.S. and Japanese authorities, and, for each tariff, to obtain the approval of *both* sets of Authorities. This has been referred to as the "double" or "dual" approval system. Rather than open and free competition with respect to tariffs, the basic principle of the ASA between the United States and Japan is that of *dirigisme*.

To sum up, the Aviation Law provides that Japan's aviation policy is based on international treaties in aviation, that tariffs must be filed with and approved by the MLIT, that agreements among airlines with regard to tariffs and other terms of transportation thus approved are exempted from the application of the Antimonopoly Law and that the MLIT is empowered to intervene, regulate, and issue orders if the MLIT judges that such action is necessary to maintain stability in international aviation. Japan, as has the United States, has also extended formal antitrust immunity to agreements reached under auspices of the International Air Transport Association (IATA), which was formed in the year after the Chicago Convention but which predates any of Japan's ASAs.

IATA, an organization composed of the world's international airlines, was formed in 1945. Beginning with first bilateral air service agreement, the Bermuda Agreement negotiated between the United States and the United Kingdom, air service agreements between the world's nations recognized IATA as a forum in which airlines would agree upon international fares. The 1952 U.S.-Japan ASA also accepted the principle of multilateral airline agreement on fares. Article 13(D) expressly notes that the United States had approved the IATA conference mechanism for reaching agreements on international air fares. Therefore, rates adopted by IATA would be used for air travel between the United States and Japan, subject to approval by the aviation authorities of each country, as noted above. Disputes between the authorities regarding airlines' tariffs were to be subject to mediation through the International Civil Aviation Organization. Under the operation of the aviation laws of each country, approval of the IATA mechanism by each country's aviation authority confers immunity from each country's competition law. While the IATA tariff conference mechanism has been the subject of concern by the JFTC, the IATA conference mechanism continues to have antitrust immunity in the United States and Japan for air travel between the two countries.

Fuel surcharges are a category of tariff related to but outside IATA. These surcharges became subject to unique oversight in Japan after the United States, in

October, 2004, reversed its previous refusal to allow the separate filing of surcharge tariffs. Japan followed suit in 2005, devising a unique application for the approval of fuel surcharges by its designated national airlines, JAL and ANA. Japan began requiring fuel adjustments, for flights both from and to Japan, to be made by means of special application to MLIT, in early 2005. Until mid-2006, the corresponding filings under Article 111 of the Japanese Aviation Law provided for an antitrust exemption for agreements with any IATA carrier, on a non-specific basis (even though the fuel surcharge was not determined within IATA). The filings for formal antitrust exemption became more specific in mid-2006, requiring that the carrier confirm that it had actually conducted all consultations with other Designated National Airlines as required by the ASAs with their respective governments. (These consultations also had an effect on the surcharge accepted by MLIT for the United States, because MLIT required surcharges to be filed by distance group, as to which travel between Japan and North America and Europe were included in the same group. Hence the fuel surcharges filed and accepted in the United States, for travel from the United States to Japan, were subject to mandated consultations by Japan's Designated National Airlines with several other designated national airlines, with respect to which these surcharges received formal antitrust immunity in Japan under Article 110.)

A study group commissioned by the JFTC expressed concern that, as of late 2007, Japan's formal antitrust exemptions for carrier agreements under Article 110 of the Aviation Law in international aviation remained broad in scope, whereas other major jurisdictions had withdrawn many such exemptions. According to the report of the Study Group on Regulations and Competition Policy (the JFTC Report), the exemption from the application of the Antimonopoly Law of aviation agreements extends to IATA Accords, Carrier Fare Accords (under ASAs), Code Share Accords, Mileage Accords, and Pool Accords, whereas none of these remains exempt in the EU; in the United States, IATA Accords, Code Share Accords and Alliance Accords are only partially exempted.[3]

3. Administrative Guidance in Aviation Industry

Administrative guidance is a widely used method for carrying out governmental policies.[4] Although administrative guidance is not as common as (and as powerful as) it was in earlier times (1960's, 1970's and 1980's), still it is a commonly used administrative technique of the Japanese Government. The Administrative Procedures Law[5] defines administrative guidance as follows:

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[3] The JFTC Report: Actual Conditions of the International Aviation Market and Issues Related to Competitive Policies – Focus on the existence of antitrust exemption systems related to international aviation agreements – November 29, 2007, Study Group on Regulations and Competition Policy, pp. 37-38.

[4] For literature on administrative guidance in Japan, see Matsushita: International Trade and Competition Law in Japan (Oxford University Press, 1993), p. 59 *et seq.*

[5] Gyosei Tetsuzuki Ho, Law 88, 1993, as amended.

"Administrative guidance is advice, recommendation, or any other act of administrative agencies to a particular entity for the purpose of accomplishing certain administrative objectives within the scope of duties or matters in charge of the agency exercising it" (Article 2:6). Once asked to give a definition of administrative guidance in the National Diet, the Director General of the Cabinet Legislation Bureau gave the following definition:

> "[Administrative guidance] is not legal compulsion restricting the rights of individuals and imposing obligations on citizens. It is a request or guidance on the part of the government within the limit of the task and administrative responsibility of each agency as provided for in the establishment laws, asking for a specific action or inaction for the purpose of achieving some administrative objective through cooperation on the part of the parties who are the object of the administration".[6]

Although this definition is abstract and susceptible to different interpretations, several features stand out. (1) Compliance is not a legal obligation. (2) It is a *de facto* rather than a *de jure* directive issued by the government. (3) It should be distinguished from the personal conduct of governmental officials issuing it. (4) It is a form of government regulation which imposes rules of conduct on enterprises. (5) Often, but not always, administrative guidance represents a consensus of the industry on which it is imposed. (6) It is sometime used in preference to invoking a law, in a situation when the law could have been imposed. (7) Combined with other policy and legal instruments, sometime administrative guidance has the *de facto* power of compulsion. (8) Administrative guidance is issued within the authority of the Establishment Law and thus pertains to subject matter over which the minister invoking it has authority. Thus, administrative guidance represents powerful pressure, exerted by an administrative agency, to coerce, *de facto,* an individual or an enterprise to act (or to refrain from acting) in ways directed by the agency.

Administrative guidance can be classified into (1) promotional administrative guidance, (2) regulatory administrative guidance, and (3) adjudicatory administrative guidance. Regulatory administrative guidance is the point of interest here.

Regulatory administrative guidance is often used by the government to carry out specific policy objectives. Although there are many examples of such regulatory administrative guidance, one example is given here. In the Oil Crisis of 1973, the Cabinet decided to establish a price-reporting system in which each ministry would issue directives (guidance) to enterprises producing products in their sectors, requiring them to report when they intended to raise prices. The ministries then pressured the enterprises to stop raising prices, or to reduce the level of price rises. This was done without invoking any specific provision of law.

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[6] Reproduced at p. 61 of Matsushita, *supra,* note 5.

However, there was a wide-spread consensus among industries and, therefore, price hikes were effectively arrested. There are similar instances in which the government intervened in activities of industries by way of administrative guidance, and *de facto* controlled them.[7]

Formally, submission to administrative guidance may be considered "voluntary" because a refusal to follow it does not, *per se,* incur legal liability. However, when exercised in combination with other legal or non legal means, administrative guidance can be equally effective as formal compulsion. For this reason, to describe administrative guidance, the Japanese Government uses the term "directive" or "direct" instead of "guidance," "suggestion," "recommendation," or "advice." This circumstance is well illustrated by the MITI Statement that was issued in relation to a U.S. antitrust case, *In re Japanese Elec. Prod. Antitrust Litigation,*[8] in which Japanese television companies were claimed by a U.S. plaintiff to have engaged in domestic and export cartels in Japan, and thereby to have attempted to damage predatorily the plaintiff in the U.S. market.

I acted as an expert witness for and adviser to the Defendants Council, which was established by the Japanese defendant companies as to U.S. legal issues. In this capacity, I had occasion to hear from company officials how the MITI had pressured the companies to engage in an export cartel. For example, the MITI had powers to finance basic R&D and to cause financial institutions such as the Export & Import Bank to issue loans to exporters or to suspend them. In those days, such governmental financial assistance was essential for the development of the electronics industry in Japan. Such loans and assistance were withdrawn by MITI's directive if MITI administrative guidance was not complied with. In this sense, MITI administrative guidance was a *de facto* compulsion.

The MITI issued a statement that the export cartel in question was "directed" by the MITI and, therefore, should be regarded as a government compulsion. This statement was sent to the State Department by the Japanese Ambassador to the United States and then was transmitted to the U.S. District Court for the Eastern District of Pennsylvania. The MITI stated:

> "Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy....Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the

[7] See Matsushita, *supra.,* note 4, pp. 62-63.
[8] *In re Japanese Elec. Prod. AntitrustLigitation*, 388 F. Supp. 565 (J.P.M.D.L., 1975).

> Export and Import Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction."[9]

When the U.S. Senate Judiciary Committee asked the Assistant Attorney General why the Justice Department had not initiated an action against the Japanese companies that were named defendants in the above mentioned antitrust case, he referred to this Japanese diplomatic note and replied in a letter sent to the Committee:

> "[It] is clear from a Japanese diplomatic note dated April 25, 1975 that the export agreement among Japanese firms was fully authorized by the Japanese Ministry of Trade and Industry, and it is claimed in that letter that the Japanese Ministry *directed* the firms to enter into and comply with such an arrangement. If the conduct were directed by the Japanese Government in a legitimate exercise of its power to control export leaving Japan, our courts would be highly likely to uphold the arrangement against antitrust challenge on the grounds of a "foreign compulsion" or "Act of State" principle."[10]

Similarly, in the Auto Case, in which the U.S. Government requested the Japanese Government to engage in "voluntary export restraint" of automobiles to the United States, the MITI "directed" Japanese automakers to limit the number of cars to be exported to the United States, and stated that there would be a legal compulsion if the directive were not honored. The Japanese Ambassador to the United States asked the U.S. Attorney General his view whether such an export control scheme would violate U.S. antitrust laws.[11] The U.S. Attorney General, William French Smith, replied in his letter to Ambassador Okawara:

> "...[W]e believe that the Japanese automobile companies' compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers. The Department

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[9] Diplomatic note from the Government of Japan to the State Department (April 25, 1975). The entire text of this statement is reproduced in Matsushita and Repeta, "The Restricting the Supply of Japanese Automobiles: Sovereign Compulsion or Sovereign Collusion ?", *Case Western Reserve Journal of International Law*, Vol. 14, No. 1 (Winter 1982), pp. 47-77, at 74-77. For an analysis of this letter, see Matsushita, "Export Control and Export Cartels in Japan", *Harvard International Law Journal,* Vol. 20, 1979, pp. 101-125, at 122-123.

[10] Letter from Assistant Attorney General Donald I. Baker to Senator Edward M. Kennedy (D. Mass) (Feb. 16, 1977), partially reprinted in 1977 *Trade Regulation Report* (CCH), No. 274, at 15-16.

[11] Letter of Ambassador Okawara to U.S. Attorney General is reproduced at pp. 78-79 of Matsushita and Repeta, *supra.,* note 10.

of Justice is of the view that implementation of such an export restraint by the Government of Japan, including the division among the companies by MITI of the maximum exportable number of units, and the compliance with program by Japanese automobile companies, would not give rise to violations of United States antitrust laws. We believe that American courts interpreting the antitrust laws in such a situation would likely so hold."[12]

In the Chemical Fiber Case, the MITI directed executives of a trade association composed of chemical fiber companies to make a plan to allocate the quantity of production of chemical fiber for each chemical company. The MITI pressured the trade association to engage in this production cartel in order to deal with a depression after the Korean War. The executives of the trade association complied with this directive, made an allocation plan and put it into practice. The JFTC intervened and challenged this as an illegal cartel. In the JFTC hearing, the executives raised a defense that their conduct was compelled by the MITI. The JFTC rejected this claim but made the following statement:

> "It is recognized that, under the circumstances of this case, the Trade Association had no choice but to resort to this unlawful conduct and the executives who were faced with the guidance of the Ministry in charge indeed deserve sympathy. However, to excuse this conduct would mean the application of the Antimonopoly Law would be subject to intention of agencies without any authority to interpret the Antimonopoly Law and this can not be accepted."[13] (emphasis supplied)

Similarly, in the Soy Sauce Association Case, the Association was directed by the Price Administration Agency of the Japanese Government to take measures to stifle a price hike, and to impose a ceiling of maximum prices charged by soy sauce producers. The JFTC challenged this as a price cartel and the Association raised a defense that this conduct was mandated by the Government. The JFTC rejected this defense but stated as follows:

> "Whether there was a guidance by administrative agencies does not reduce the liability of enterprises in respect to administrative measures that the JFTC takes in order to remedy the illegality although this may be an extenuating factor to be taken into account when considering whether the respondent is held as criminally liable."[14] (emphasis supplied)

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[12] The entire text of the letter of Attorney General is reproduced at pp. 80-81 of Matsushita and Repeta, *supra.*, note 10.

[13] In re Chemical Fiber Association, *Shinketsushu* (FTC Decisions Reporter), Vol. 5, p. 17 (1953).

[14] In re Noda Soy Sauce Company, *Shinketsushu*, Vol. 4, p. 1 (1952).

In both of the above decisions, the JFTC recognized in *dicta* that a pressure or *de facto* compulsion of the government could constitute an exoneration or extenuation *from criminal liability* of persons faced with formidable governmental pressures. No criminal penalties were imposed and only prospective restraining orders were implemented. The JFTC has the power to recommend a violating person for criminal prosecution to the Prosecutor General. If a conduct which is in violation of a provision of the Antimonopoly Law is *de facto* coerced by governmental pressures, the JFTC would never recommend the perpetrator for criminal prosecution. In this sense, a person who committed a violation in compliance with governmental directives would be treated more leniently than a person who committed a violation without such a directive.

In the Oil Cartel (Price Fixing) Case, the MITI prescribed the price level of petroleum products in the face of price hikes caused by the Oil Crisis in early 1970's. The MITI pressured petroleum companies to refrain from raising the price of petroleum products above the level indicated by the MITI. Petroleum companies discussed among themselves a desirable level of price and jointly requested the MITI to set up a maximum at the level requested by the companies. This joint request was challenged by the Public Prosecutor's Office as an illegal cartel. However, the Supreme Court excused the companies for the reason that the pressures of the MITI were so strong and, in order to remain profitable in the market, the companies had no choice but to resort to this joint discussion and request. The Supreme Court recognized the difficulty that the companies were confronted with, and exonerated this conduct from legal liability under Japan's Antimonopoly Law.[15]

With regard to the role of administrative guidance in air transportation, the situation is comparable to that in any of the other industries above mentioned. In the aviation area, the Ministry in charge is the MLIT. Under the authority given to the MLIT by the Aviation Law, the MLIT has the power to license business, allocate take off and landing slots, and approve or disapprove operation schedules and related matters. As touched upon earlier, the MLIT has the power to intervene in and regulate international tariffs if the MLIT judges that such tariffs are inappropriate. If the MLIT refuses to allow tariff changes, for example, an airline will be unable to respond to changes in market conditions, including recovery of increased costs. This could impose a significant financial penalty, just like a formal fine.

Professor Sakakibara discusses in his report ("the Sakakibara Report")[16] details of administrative guidance by the MLIT in the aviation industry. He states

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[15] Decision of the Supreme Court, February 24, 1984, *Keishu* (Supreme Court Criminal Cases Reporter), Vol. 38, No. 4, p. 1287 *et seq.*

[16] The Sakakibara Report (Commercial Airlines and Civil Aeronautics Administration in Japan). All references are to the original report in Japanese.

that the MLIT "directed" tariff schedules, including discount rates.[17] The MLIT introduced a tariff band system in 1996 whereby the MLIT approved a band or range within which tariffs were to be determined by airlines. The MLIT predetermined the standard tariff rates and indicated the margin of discount that airlines were to observe. With respect to international tariffs, the practice was that JAL proposed to the IATA changes of tariffs in accordance with the directives of the MLIT. Once IATA approved the tariff change, it was reported to the MLIT and other Aeronautical Authorities. Although nominally proposed to IATA by Japan's Designated National Airlines, it was clear that such proposals were as directed by the MLIT.

Professor Sakakibara points out MLIT's informal direction was made possible by the power of the MLIT in regard to, *inter alia*, the allocation of takeoff and landing slots, and license on new entry and withdrawal. The allocation of slots has been regarded as part of the governmental power under Japan's ASAs and national law. By using this power to allocate or withdraw slots, the MLIT could wield tremendous pressures on airlines to comply with ministry direction. Airlines could not risk the consequences of failing to comply, even though such consequences were not a formal legal punishment for failure to follow administrative guidance.

The above described situation with regard to administrative guidance in the international aviation business is similar to the situations in which administrative guidance operated as governmental compulsion in other areas such as international trade. It should be noted here that the JFTC and the Antimonopoly Law play very little part, if any, in regulating tariffs in international aviation. Even where there is no formal antitrust immunity, the JFTC has not attempted to intervene as to tariffs set within ranges approved by MLIT formally or directed informally. In my judgment, based on the cases discussed above and my decades of experience in Japan's antitrust law, the JFTC would not have a sound basis for such intervention because the conduct of the Designated National Airlines has been so comprehensively regulated by the MLIT. Accordingly, an agreement or information exchange pertaining to a carrier fare that is within upper and lower zone limits as declared by the MLIT in my view would not be actionable by the JFTC under the Anti-Monopoly Law, because MLIT, in setting such zones, was exercising its authority as to outcomes considered, by the Minister, to be reasonable and acceptable under Japan's legal framework for aviation. In this respect, it may be noted that since Japan's current regime for international aviation operations began in 1952, the JFTC has never brought an enforcement action against private carriers flying internationally to or from Japan.

4. Comity Considerations in the U.S./Japan Antitrust Agreement

Under principles of international comity, national law enforcement authorities have considered the interests of other nations where those interests

[17] The Sakakibara Report, pp. 4-7.

would be substantially affected by an action taken. Comity is more a matter of policy than a jurisdictional requirement. It is, however, recognized as a matter of international law. These principles assume that due respect will be paid to the interests of other sovereign nations. This consideration has prompted national law enforcement agencies to refrain from bringing legal actions where to do so would be an intrusion.

One such sensitive circumstance, as illustrated in the cases discussed above, is the predicament of enterprises and individuals caught between the demands of sectoral ministries and the expectations of enforcement agencies. By its nature, administrative guidance from government industrial and export ministries may seek to promote the growth and stability of the enterprises subject to their jurisdiction. The Japanese competition agency, the JFTC, may take a different view of such situations and seek to promote competition in all sectors, even those subject to administrative guidance promoting or compelling collaboration among enterprises. Japanese law recognizes that enterprises caught in the middle of such jurisdictional battles deserve sympathetic consideration for their plight. Indeed, the JFTC, itself, recognizes that in such a situation, *criminal* sanction is not warranted, even if the presence of administrative guidance does not totally excuse a violation of the Antimonopoly Law. Note also that the JFTC has not enforced the Japanese Anti-Monopoly Law, criminally, as to conduct in international aviation, the U.S. government has exercised discretion, based on comity principles, when made aware of such circumstances.

In commerce between the U.S. and Japan. This can be seen in the Tanner Crab Case, an agreement entered into among Japanese trading companies challenged by the U.S. Justice Department. When this case arose, I was asked by one of the trading companies which had been made a target of a U.S. grand jury investigation to advise it on the Japanese and U.S. antitrust law issues involved. My affidavit was transmitted from the trading company to the U.S. Justice Department. Through this experience, I learned how the Japanese government directed the importers to establish a trade association in which a close exchange of price information took place.

Before this case, there had been speculative purchases, by Japanese trading companies, of U.S. marine products. As a result of this speculation, some companies incurred huge financial losses. The Fishery Agency (part of the Ministry of Agriculture, Forestry and Fishery) intervened to prevent such excessive speculations of trading companies, and directed them to establish an association to stabilize trade terms. The trading companies which were made defendants in this case exchanged price information to stabilize the import prices of tanner crab. In this way, the policy of the Fishery Agency was to stabilize price, prevent speculation, and avoid "excessive competition." This policy was implemented.

Initially the U.S. Justice Department opened a criminal investigation. However, later after receiving a Note Verbale from the Japanese government, delivered to the U.S. Department of State, the U.S. Justice Department decided not to indict criminally and brought a civil complaint instead. The Japanese Government (the Foreign Ministry, The Fisheries Agency, the MITI and the JFTC) approached the Justice Department and pleaded that the association in question was a creation of the guidance of the Japanese Government, and that to hold activities of this association as a crime would be offensive to Japan's governmental policy. The case was settled by a consent judgment between the Justice Department and the defendants.[18] This case is an example where the U.S. Justice Department took into consideration when deciding the nature of action to be taken with respect to the conduct of foreign entities, when such conduct was mandated by the foreign government. Switching from a criminal prosecution to a civil injunctive suit is an example of exercising international comity.

Among international treaties entered into between the United States and Japan, two are particularly important, i.e., the Friendship Commerce and Navigation Treaty between the United States and Japan (The JFCN Treaty) and The Agreement between the Government of Japan and the Government of the United States Concerning Cooperation on Anticompetitive Activities (U.S./Japan Antitrust Agreement). Each of them observes the principle of international comity to be applied to international transactions between the two countries.

Article II of the FCN Treaty states that "Nationals and companies of either Party shall be free from unlawful molestations of every kind." Article IV states,

> "Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights."

Article 6.1 of the U.S./Japan Antitrust Agreement states:

> "Each Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of penalties or relief sought in each case."

Article 6.3 states that either Party considers that the enforcement activities by the Party may adversely affect the important interests of the other Party and, when considering this, take into account certain factors. One such

[18] United States v. C. Itoh & Co. et al, 1986 Trade Cases Para 67,004 (U.S.D.C., WD. Washington, Oct. 20, 1982).

factor is listed in Article 6.3, Paragraph (e), which states that each Party shall consider "the degree of conflict or consistency between the enforcement activities by a Party and the laws of the other country, or the policies or important interests of the other Party ...."

There would be a conflict between the Aviation Law and its enforcement activities in Japan and U.S. antitrust laws if agreements authorized by the Aviation Law and directed by administrative guidance of MLIT in Japan, or if industry negotiations related to or supported by the MLIT, are held unlawful under U.S. antitrust laws, especially if criminal liability is attached. It is noted by Professor Goodman that even where the guidance itself may be considered "voluntary," the obligation to enter into all of the negotiations as required by the ministry is essentially compulsory, even if the guidance itself can later be rejected.[19] It is to be noted also that agreements duly authorized by the MLIT are exempted from the application of the Antimonopoly Law in Japan and removed from the scope of competition laws.

This analysis suggests that, *inter alia*, under the U.S./Japan Antitrust Agreement and the principle of comity enshrined therein, an enforcement agency in the United States should take into account the above legal situations in Japan when considering whether to bring any action related to conduct directed in Japan under authority duly granted under Japanese law and implemented, formally or informally, under Japan's air transportation policy.

It is to be noted also that, when dealing with a subject matter that cuts across the boundaries of more than one nation, there would be an overlap and possible conflict of jurisdictions. In Japan, conflict of law issues are handled under the General Law on the Application of Law.[20] One of the principles incorporated in this law is that the applicable law should be the law of the jurisdiction to which the subject matter of the case in question is most closely related in a case where there is a possibility that several laws of different countries may apply to it.[21] Furthermore, Article 42 of the Law states that an application of a foreign law is rejected if such application creates a conflict with the public order in Japan. The public order is incorporated in laws and regulations in Japan. The Aviation Law and the transportation policy incorporated in this law is a public policy/public order in Japan. Therefore, in Japan, only this law and policy is exclusively applied excluding application of any foreign law that is contrary to them.

The jurisdictional rule of reason is recognized by U.S. courts in *Timberlane and Mannington Mills*. According to this rule as to when jurisdiction should be exercised, Japanese regulatory principles in international aviation should be most

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[19] Carl F. Goodman, The Rule of Law In Japan, A Comparative Analysis (Walters Kluwer, 2008), p. 484.
[20] Ho no Tekiyo nikansuru Tsusoku Ho (Law 78, 2006).
[21] Article 8:1 of this law.

appropriately taken into account by the U.S. authority in deciding whether to enforce a criminal measure against conduct that is heavily regulated under Japan's legislation and international agreements on air services. In making these decisions, it is important to bear in mind that in aviation businesses, the government is authorized to intervene into and regulate business activities, and approve agreements among enterprises on tariffs.

May 17, 2010
Mitsuo Matsushita

Exhibit 4

Trade regulations and trade remedies

Mitsuo Matsushita and Shintaro Watanabe
Nagashima Ohno & Tsunematsu

This chapter covers selected, not all, topics in connection with Japan's domestic laws and regulations which concern trade regulations and trade remedies.

Japan's domestic trade regulation system is based on the WTO agreements and other international regimes. In the system, there are three categories of trade laws and regulations. The first category is comprised of laws concerning customs. Included in this category are the Customs Law (*Kanzei-hou*), the Customs Tariff Law (*Kanzei Teiritsu-hou*) and the Temporary Tariff Measures Law (*Kanzei Zantei Sochi-hou*). The Ministry of Finance (*Zaimu-shou*) and its subsidiary, Customs (*Zeikan*), is in charge of customs policy and administration. The second category is made up of laws that generally regulate trade in goods. The Foreign Exchange and Foreign Trade Law (*Gaikoku Kawase oyobi Gaikoku Boueki-hou*) falls within this category. This law delegates power to regulate cabinet orders (*Seirei*, which may be decided by the cabinet), and such cabinet orders further delegate it to ordinances (*Shourei*, which may be decided by individual ministers). So, it is important to refer to ordinances delegated by the Cabinet Order on Import Trade Control (*Yunyu Boueki Kanri-rei*) and Cabinet Order on Export Trade Control (*Yushutsu Boueki Kanri-rei*) in order to understand the current status of regulations. These laws and regulations are enforced by the Ministry of Economy, Trade and Industry (*Keizai Sangyou-shou*, or METI). The third category has laws that concern trade in goods from the perspectives of specific policy interests. For instance, a person wishing to import beef into Japan must obtain, among others, the confirmation of Customs that such person has obtained an Import Quarantine Certificate issued by Animal Quarantine Service of Ministry of Agriculture, Forestry and Fisheries in accordance with Domestic Animal Infections Diseases Control Law. Otherwise, Customs will not issue import license (as of this writing import of beef from the United States is suspended by the Ministry's policy not to issue the Certificate until the issue of the safety of US beef is resolved). According to the Customs Law, laws and regulations in the second and third categories are referred to as the "other laws and regulations".

Import control

Japan has an import clearance procedure whereby a person wishing to import goods (the importer) shall declare such goods before Customs, pay custom duty and apply for import permission (*yunyu-kyoka*) from the director general of customs (*Zeikan-chou*) in accordance with the Customs Law. In addition, where such importation requires other permission, approval or governmental authorisation in accordance with the other laws and regulations, the applicant shall submit proof of such permission, approval or governmental authorisation to the director general of customs in order to obtain import permission.

Import quota and authorisation

Article 52 of the Foreign Exchange and Foreign Trade Law provides that an importer has an obligation to obtain import authorisation (*yunyu-shonin*) imposed upon them in accordance with a cabinet order. Pursuant to this article, article 4, paragraph 1, Item 1 and article 9 of Cabinet Order on Import Trade Control provide for import quota. Goods which need import quotas are made public by METI in Import Public Notice (*Yunyu Kohyo*) No.1. The import quota regulation in this paragraph does not concern the place of origin or shipment of the goods to be imported. Such goods include marine products, narcotics, uranium ore, nuclear-related parts, weapons, and certain goods the importation of which is controlled under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the Washington Convention), the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol) and the Stockholm Convention on Persistent Organic Pollutants. The importer of such goods is required to obtain an import quota and an import authorisation from METI before actual importation of the goods.

Authorisation in respect of particular place of origin or shipment

This regulation concerns certain goods to be imported where such goods have a particular place of origin or where such goods are to be imported from particular places of shipment. Such regulated goods include marine products, textiles, looted cultural assets, logs and lumber, diamond, and certain goods the importation of which is controlled under the Washington Convention, Montreal Protocol, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention) and the Chemical Weapons Convention. The importer of such goods needs to obtain an authorisation from METI in advance.

Prior confirmation by minister in charge of goods

Some importation is required to be confirmed (*Kakunin*) by the minister in charge of goods to be imported before actual importation, instead of import authorisation by METI as described above. For example, the Ministry of Health, Labour and Welfare, which is in charge of such vaccines, before actual importation, shall confirm importation of certain vaccines for human use for the purpose of clinical trial.

Confirmation at time of custom process

Certain regulated goods do not need prior governmental authorisation, but are required to be confirmed by Customs at the time of custom clearance that certain documents have been obtained by the importer. Such goods include poppy and marijuana seeds, nuclear isotopes, certain textiles, psychomimetics, diamonds, agrochemicals and other goods.

Prohibited goods

In general

Certain goods are prohibited from being imported into Japan in accordance with article 21, paragraph 1 of the Customs Tariff Law. Such contraband includes narcotics, guns and firearms, explosives, certain chemicals, counterfeit currency, books with obscene content, goods that infringe intellectual property rights (IPRs) effective within the territory of Japan and dead copy which violates Unfair Competition Prevention Law (*Fusei Kyoso Boshi-hou*). The director general of customs may confiscate and destroy such goods even if

such goods are imported. Alternatively, the importer may be ordered to re-ship them to a foreign country or area. Due to a recent amendment of the Customs Tariff Law, the IPR now includes patent, utility models right (*jitsuyo-shin'an ken*), design right, trademark right, copyright and copyright-related right, integrated semiconductor circuits right, and seedling right (*Ikuseisya ken*).

Verification procedure in respect of goods that infringe IPRs

Prohibition on goods infringing IPRs (the infringing goods) has been evolving recently, thanks to the government's campaign for the protection of IPRs. First of all, Customs is entitled to investigate and penalise importation of prohibited goods. Therefore, Customs may intercept and prohibit the importation of the infringing goods at its sole discretion without any application or request from the IPR holder. In practice, however, it is almost impossible for Customs to recognise that a particular good pending import permission is an infringing good. The Verification Application Procedure (*Yunyu Sashitome Moushitate Seido*) and the Verification Information Provision Procedure (*Yunyu Sashitome Jouhou Teikyo Seido*) are procedures for the IPR holder to provide Customs with necessary information to recognise the existence of the infringing goods. The former differs from the latter in that the former is applicable to the IPR holder holding a patent, utility models right, design right, trademark right, copyright and copyright-related rights and seedling right whereas the latter is applicable only to integrated semiconductor circuits rights. The former provides the IPR holder with certain procedural rights (the right to inspect the infringing goods at Customs during a verification procedure and right to submit an objection to the court against an unfavourable decision made by Customs not to accept their application) and obligations (Customs may order the IPR holder in a verification procedure to give a deposit for compensation for possible damage to be incurred by the importer) which are not available to IPR holder under the latter. Only after the acceptance of the application from the IPR holder, may Customs acknowledge sufficient details of the infringing goods in import clearance procedure. When Customs actually recognises the infringing goods, it notifies the IPR holder and the importer (the parties) that the verification procedure is initiated. In the verification procedure, the parties submit proofs and opinions. Where a patent, utility models right or design right, or seedling right is concerned, the IPR holder may further apply for the opinion of the commissioner of the Japan Patent Office or the Minister of Agriculture, Forestry and Fisheries, respectively, in respect of infringement. If Customs affirms the infringement by the infringing goods, such infringing goods must be re-exported, be discarded or confiscated, or be modified in part and imported with the permission by the IPR holder. If Customs does not affirm the infringement, the infringing goods may be imported. The average period of the verification procedure is 30 days.

Parallel import

In accordance with the Courts' decisions in respect of parallel import of goods licensed in a foreign country or area, Customs has adopted official notices (*Tsuhtatsu*) regarding parallel import. In relation to trademark rights, goods (i) with a trademark legally attached before distribution, (ii) where there is such a relationship between the person attaching the trademark to the goods and distributing such goods and the trademark rightholder in Japan that renders the two persons deemed as identical, shall be treated as goods of parallel import and not be regarded as infringing the trademark right in Japan. In relation to patents, utility models rights and design rights, goods shall be regarded as goods of parallel import and not be regarded as infringing such rights where, for instance, the IPR holder and importer have agreed to exclude the territory of Japan from the territory of distribution or sales in respect of the goods in question.

Export control

Similarly to the import clearance procedure, export clearance procedure requires a person wishing to export certain goods (the exporter) to submit to Customs an export declaration with a view to obtaining export permission (*yushutsu kyoka*) from the director general of Customs in accordance with the Customs Law. In addition, the exporter of certain goods shall submit proof of permission, approval or other governmental authorisation which is required in respect of such goods to the director general of Customs in order to obtain export permission. Such permission, approval or other governmental authorisation includes an export licence (*yushutsu kyoka*) and an export authorisation (*yushutsu shonin*) to be issued by METI in accordance with the Foreign Exchange and Foreign Trade Law.

Types of goods subject to export licence under international export control regimes

The first category of export control where an export licence is required is the enforcement of international export control regimes including the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, the Wassenaar Arrangement, the Zangger Committee and the Chemical Weapons Convention. Subject to this export licence are: weapons, goods relating to weapons of mass destruction (nuclear, chemical and biological weapon, and missile) (WMDs), goods relating to conventional weapons.

The second category of export control where an export licence is required is the so-called 'catch-all regulation', effective as of 1 April 2002. Under this control an exporter shall obtain an export licence (i) where such exporter knows that the goods to be exported will be used for the development of WMDs or (ii) where METI had informed the exporter that such exportation requires an export licence issued by METI.

Goods subject to export authorisation

In addition to the above, certain goods are regulated in accordance with article 48, paragraph 3 of the Foreign Exchange and Foreign Trade Law and article 2 of the Cabinet Order on Export Trade Control. Such goods are provided for in Annexed Chart 2 of the Cabinet Order, and are divided into four categories as follows: (i) goods subject to domestic supply-demand management by the government (eg, crude oil, petroleum products, nuclear fissile materials, formula feed, seeds of Japanese larch and eel fry), (ii) goods regulated in order to maintain orderly export (eg, fishing boats), (iii) prohibited goods in accordance with the Foreign Exchange and Foreign Trade Law (eg, counterfeit coin and banknotes, books with obscene contents, narcotics, marijuana and stimulant drug, important cultural assets and goods which infringe intellectual property rights in the country of destination), and (iv) goods subject to regulations in accordance with international agreements (including the Rotterdam Convention on Prior Informed Consent, the Washington Convention, the Montreal Protocol and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal).

New legislation

According to a draft amendment of the Customs Law which has been submitted to the Diet, exportation of narcotics, child pornography and goods that infringe seedling right will be prohibited also under the law as of 1 June 2006. Also introduced will be a verification procedure of the goods which allegedly infringe IPRs in the country of destination. This procedure is similar to that of import of goods which allegedly infringe domestic IPRs.

Special economic sanction

According to article 10 of the Foreign Exchange and Foreign Trade Law, unilateral economic sanction may be invoked with a cabinet

decision (with ex-post authorisation by the Diet within 20 days of such decision) where such sanction is "especially necessary in order to maintain the peace and security of Japan". In Japan, a cabinet decision needs consensus of ministers but is regarded as more appropriate decision-making than any action taken by the Diet in order to address emergency situations. The sanction includes control of international payments, capital transactions, outbound investment and trade control. The government will withdraw such sanction immediately after the Diet resolves not to authorise such sanction. No sanction has been imposed, to date, pursuant to this article 10.

Trade remedies

In general, trade remedies made available under Japanese laws are consistent with the WTO agreements. Notably Japan has a very limited number of trade remedy cases where measures are actually taken by the authorities, and such scarcity of precedents leaves trade remedy laws and regulations unclear in their meanings. This chapter touches upon cases where an application for each trade remedy was filed and does not discuss detailed interpretative and procedural issues.

Anti-dumping duty

An anti-dumping measure is provided for in article 8 of the Customs Tariff Law. Before 1991, only three applications under article 8 were filed but withdrawn before the commencement of the investigations. In 1991, Japan made its first final determination to impose anti-dumping duty in respect of ferrosilicon manganese from China, South Africa and Norway. In 1995, the second final determination was made with respect to certain cotton yarns from Pakistan. The third and most recent anti-dumping duty was imposed against certain polyester staple fibres from Korea and Chinese Taipei. Only the latter is in effect at the time of writing.

Countervailing duties

Countervailing duties (excluding anti-dumping measures) are provided for in article 7 of the Customs Tariff Law. Japan initiated an investigation on imports of cotton thread from Pakistan in 1983, which was aborted by Pakistan's elimination of the subsidy in question. Another application in respect of Brazilian ferrosilicon in 1984 was withdrawn before the investigation stage. The third and latest application with respect to DRAMs from Korea resulted in Japan's first imposition of countervailing duty of 27.2 per cent as of 27 January 2006.

General safeguard measure

Domestic safeguard measures of general nature include quantitative restriction and special duty. The former is provided for in article 52 of the Foreign Exchange and Foreign Trade Law, article 3, paragraph 1 of Cabinet Order on Import Trade Control and related public notices. The latter is provided for in article 9 of the Customs Tariff Law and the Cabinet Order on Emergency Duty, etc. Japan has enforced quantitative restrictions (import quotas) only once against Chinese leeks, shiitake mushrooms and rushes in 2001.

Emergency measures on custom duty on beef and other goods

Emergency measures on custom duty on certain goods are provided for in articles 7-3 to 7-6 of the Temporary Tariff Measures Law, in part as compensation for expected damage arising from the entry into force of the Agreement on Agriculture and incurred by domestic producers, and in part to enforce certain bilateral Free Trade Agreements.

Special safeguard measures against the People's Republic of China

Transitional product-specific safeguard measures (emerging tariff) against the People's Republic of China is provided for in article 7-7 of the Temporary Tariff Measures Law in accordance with Protocol on the Accession of the People's Republic of China. This special safeguard measure is effective until the end of 2008. In addition, Japan may set import quota on certain goods originating in PRC in accordance with the Foreign Exchange and Foreign Trade Law until 10 December 2013. Also available is import quota on certain textile products from PRC until the end of 2008. Japan has not exercised these types of safeguard measure to date.

Retaliation custom

Japan imposed its first retaliation custom on certain goods originating in the United States as of 1 September 2005, in accordance with the decision of the Dispute Settlement Body of the World Trade Organization (US – Offset Act (Byrd Amendment)).

Export and Import Transaction Law

The Export and Import Transaction Law (*Yushutsunyu Torihiki-hou*) is a piece of legislation to create certain export and import cartels (commonly referred to as *Dokusen Kinshi-hou*) that are exempt from the Anti-monopoly Law, and to regulate certain unfair export trade which was frequent immediately after the end of World War II and to protect national renown at that time. The latter policy interest is undeniably obsolete and as of this writing there is no regulated export trade under this law.

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Exhibit 5

Foreign direct investment, public order and national security: Lessons from the case of J Power[1]

Noboru Kashiwagi*
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1. The Development of the Case

J Power is a stock company established under the laws of Japan.[2] It was established as a government-owned company in accordance with the Promotion of Electric Power Development Act of 1952 ("EPDA").[3] The purpose of J Power is to increase the electric power supply through the development of sources of electric power in accordance with the basic plan of development prepared by the Minister of Economy, Trade and Industry.[4] At the beginning, J Power was owned by the government, with a controlling stake of 66.69 per cent of shares, more than the ratio required for passing a special resolution.[5] That meant that J Power was effectively under the sole control of the government. The remaining 33.31 per cent of shares were held by nine regional electric power companies. J Power was established in order to construct the power plants and dams that the nine regional power companies could not afford to after the destruction of facilities during World War II. These regional power companies did not have enough capital to do so. In 1997, the government decided to privatize J Power. So, in 2004, it was listed on the Tokyo Stock Exchange and the government sold all of its stock. At present, 42.51 per cent of its outstanding shares are held by financial institutions, 36.67 per cent by foreign companies, 11.08 per cent by other companies, and 8.43 per cent by individuals.[6] J Power is currently constructing power plants in Japan and also helping the construction of power plants in developing countries, in addition to investing in companies that own electric power plants in developed countries. One director vice-president and one director of J Power are former officials of the Ministry of Economy, Trade and Industry. Two out of five statutory auditors are former officials of the Ministry of Finance.

The Children's Investment Master Fund, a Cayman entity, that was presumably established as a vehicle for the Children's Investment Fund Management (U.K.) LLP (jointly referred to as "TCI"), acquired 9.9 per cent of shares in J Power. Then, it tried to increase its holding of shares up to 20 per cent. In order for a foreign investor to acquire more than 10 per cent of the oustanding shares of a

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[1] The author owes a debt to Kojou Makoto, *TCI fandoniyoru J Power kabushiki no Shutoku* (The Acquisition of Shares of J Power by TCI), 337 Hogaku Kyoshitsu Oct. 2008, 8. Regarding the history of Foreign Direct Investment in Japan, see Richard W. Rabinowitz, The Genesis of The Japanese Foreign Investment Law of 1950, 10 Publication of the German-Japanese Lawyers' Association (1998): Richard W. Rabinowitz, Japan's Foreign Investment Law of 1950: A Natural History, 19 Publication of the German-Japanese Lawyers' Association (2003).

[2] The word "company" is the English translation of the Japanese *kabushiki kaisha* that corresponds to a business company, public company, Aktien Geselschaft or Sosiété Anonime.

[3] *Dengen Kaihatsu Sokushin Ho* (Act No. 283 of 1952) This Act was repealed in 2003 by Act No. 92 of 2003.

[4] Section 13 of EPDA.

[5] A special resolution requires a positive vote of not less than two-thirds of those present at the general meeting. Sec. 343 of the Commercial Code then effective.

[6] See: http://www.jpower.co.jp/annual_rep/ann01000.html, visited on 27 December 2008.

particular Japanese company conducting a designated business, the investor has to give prior notice of the acquisition to the Minister of Finance and the specifc minister with jurisdiction over the business. Public Notice No. 1 of the Cabinet Office and other various ministries dated 7 September 2007 lists various businesses in which foreign investment may be likely to harm national security or public order. Among them, the business of operating electric power plants, electric booster stations and electric business places is designated in Annex 2 as one of these designated businesses. Therefore, TCI had to notify the government of the intended acquisition of more than 10 per cent of J Power's shares. It did this on 15 January 2008, stating that it intended to acquire between 10 and 20 per cent of J Power's shares.

The Minister of Finance and the minister with jurisdiction may investigate the notified acquisition of shares, to determine if the investment may be harmful to national security or public order and safety.[7] In this case, the Ministry of Finance and Ministry of Economy, Trade and Industry ("METI") were the ministries with jurisdiction.

After extending the stay period, the Ministry of Finance and METI recommended TCI to abandon the intended acquisition of J Power's share on 16 April 2008, in accordance with Article 27 (5) of the Foreign Exchange and Foreign Trade Act. On 25 April, TCI gave notice of its intention not to accept the recommendation. On the same day, TCI was given an opportunity to explain the reasons why the intended transactions should be approved. TCI submitted its explanation on 8 May. On 13 May 2008, the Ministry of Finance and METI jointly ordered TCI to abandon the acquisition of more than 10 per cent of J Power's outstanding shares. The reasons for the order were explained by both ministries as follows:[8]

(a) The electric utility business has been designated as a business in which foreign investment is subject to prior notification based on the perspective of the "maintenance of public order" and other reasons, from the beginning of the creation of the framework for inward direct investment under the Foreign Exchange and Foreign Trade Act. The standard is widely and internationally accepted under Article 3 of OECD Code of Liberalisation of Capital Movements; (b) J Power plays a central role in Japan's nuclear fuel recycling system with the construction of the Oma Nuclear Power Plant, and a role in maintaining the network of electric power distribution; and (c) a role as a wholeseller of electric power by owning basic power generation facilities.

The Oma Nuclear Power Plant receives plutonium obtained by reprocessing spent nuclear fuel from the regional electric power utility companies, and uses it in its thermal furnace. It is expected to occupy a central position in the national policy on the recycling of nuclear fuel. Considering the important roles that J Power is expected to perform in the national policy on nuclear energy and nuclear fuel recycling, the Minister of Finance and METI examined the possible effects of the acquisition of J Power's shares and the exercise of the shareholder

[7] Article 27 (3) of Foreign Exchange and Foreign Trade Act (Act No. 228 of 1 December 1949). An English translation is appended at the end of this article.
[8] See: https://www.mof.go.jp/jouhou/kokkinn/tci20080513-02.htm, visited on 28 December 2008.

rights by TCI upon the management of J Power, the planning, operation and maintenance of nuclear power plants, and the national policy regarding the stable supply of electric power and recycling of nuclear power and nuclear fuel.

As regards the likelihood of disturbance to the maintenance of public order, TCI practices as one of its policies aggressive actions towards the company in which it has invested in order to increase the shareholder value, such as attempting to influence the management of the company and solicit proxies. According to information submitted by TCI with regard to a case concerning a company listed on the German Security Exchange, it was recognized that TCI had succeeded in changing the management of the company in which TCI had invested, even though its shareholdings were about 10 per cent.

TCI submitted various proposals to the management of J Power openly or privately, such as the request that J Power sets the Return on Equity (ROE) target as at least 10 per cent and the Return on Assets (ROA) target as at least 4 per cent, and that the management should be held accountable for the achievement of such targets. TCI suggested ideas to improve management, such as the appointment of independent outside directors in order to strengthen the corporate governance of J Power, but was silent as regards any possible harm to the Oma nuclear power plant, future investment in infrastructure and possible damage to the financial strength of J Power.

Mainly for these reasons, both ministers concluded that it was likely that TCI will influence the management of J Power and the planning, operation and maintenance of infrastructures including electrical power cables and nuclear power plants, thereby influencing the stable supply of electric power and the national policy on nuclear power and nuclear fuel recycling.

While TCI proposed to set up performance targets for the operation of J Power and for the management to be accountable for the achievement of such targets, TCI did not disclose the concrete methods of achieving such targets. Therefore, both ministers decided that if the proposed share acquisition by TCI was realized, it was likely to directly or indirectly influence national policy regarding the stable supply of electric power, nuclear power and nuclear fuel recycling, with the possibility of a freezing of, or a large delay in, the construction of the Oma nuclear power plant or a possible reduction in capital spending on infrastructure and/or maintenance expenses.

2. Regulations on Foreign Direct Investment into Japan

Those who give notice to the government may not make the intended investment until thirty days from the notification have expired (Article 27(3) of the Foreign Exchange and Foreign Trade Act). The Minister of Finance and the minister with jurisdiction over the business involved may extend the thirty-day period for up to four months, if they believe it necessary to examine whether the intended investment will impair national security, disturb the maintenance of public order or the protection of public safety, or bring about a significantly adverse effect to the smooth management of the Japanese economy.

After the examination, the Minister of Finance and the minister with jurisdiction over the business related to the proposed investment may recommend that the

person who submitted the notification make modifications to or abandon the proposed investment, after obtaining the opinion of the Council for Customs and Foreign Exchange, if they believe that: (i) the investment will impair national security; (ii) the maintenance of public order or the protection of public safety will be disturbed, or (iii) a significant adverse effect will be brought to the smooth management of the Japanese economy.[9]

The person who received the recommendatiou must give notice to the Minister of Finance and minister with jurisdiction over the business related to the proposed investment, to accept the recommendation or not within ten days after the receipt of the recommendation.[10]

If the person does not accept the recommendation or fails to give notice of acceptance or non-acceptance, the Minister of Finance and the minister with jurisdiction may order the modifications or the abandonment of the proposed investment.[11]

There is no definition of the words "public order," nor the words "national security" in the Foreign Exchange and Foreign Trade Act, nor in related statutes, regulations and cabinet or ministerial orders. The government appears to have regarded the businesses listed in Annex 1, attached to the Public Notice No. 1 of the Cabinet Office and other ministries of 7 September 2007, as being related to national safety and those listed in Annex 2 as being related to, among other things, public order. This is clear in Appendix 2[12] to the press release on the order to abandon the inward direct investment,[13] which explains that Japan has restricted inward direct investment related to the electric utility business as it concerns "public order", in compliance with the OECD Code of Liberalisation of Capital Movements. Appendix 2 also lists the following businesses as similarly restricted for reasons of public order: gas and heat utilities, communication, broadcasting, water supply, railroad and the transportation of public passengers. Concerning national security, it lists manufacturing businesses related to arms and weapons, airplanes, nuclear power and space development. Concerning public safety, it lists manufacturing of bio-drug products and security businesses. In addition to the restricted businesses in accordance with the OECD Code, it states that Japan restricts certain businesses from inward direct investment for reasons unique to Japan. Such examples listed include: agriculture and fishery, oil, leather industry, leather product industry, air transportation and ocean transportation. The OECD Code of Liberalisation of Capital Movements does not contain a definition of "public order," "national security" or "public safety." Article 3 simply states that the provisions of the Code shall not prevent a Member from taking action that it considers necessary for the maintenance of public order or the protection of public health, morals and safety.

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[9] Article 27(5) of Foreign Exchange and Foreign Trade Act, supra, note 7.
[10] ditto, (7)
[11] ditto, (10)
[12] See: http://www.mof.go.jp/jouhou/kokkin/tci.betten2_20080513.pdf, visited on 28 December 2008.
[13] See: http://www.mof.go.jp/jouhou/kokkin/tci20080513-01.htm, visited on 28 December 2008. The words "inward direct investment" mean an investment by a foreign investor in assets in Japan including the acquisition of the stock of a Japanese company.

3. The Meaning of "Public Order"

As explained, attachment 2 entitled Supplemental Materials and attached to the Ministry of Finance and METI's press release dated 13 May[14] indicates manufacturing and other businesses related to arms and weapons, airplanes, atomic power and space development, as businesses that affect "national security." It further indicates businesses related to electric, gas and water utilities, heat supply, communication, broadcasting, railroad operation, and public passenger transportation as businesses affecting "public order." It also indicates businesses relating to bio-drug production and security services as businesses affecting "public safety." In the case of J Power, its business relates to nuclear energy and electric power supply. Therefore, it seems to the author, that the business of J Power relates not only to public order but also to national security. However, all the documents released by the government on the internet concerning TCI's notification only deal with public order.

Public order ("*oyake no chitsujo*") is not a defined term. It is used in Article 90 of the Civil Code as follows: "A juristic act with any purpose which is against public order and good morals is void."[15] In the interpretation of Article 90, the words "public order" and "good morals" have been understood together without separating the two. According to the Legal Dictionary, public order means the general interest of a nation or society, and good morals means the general ethical belief of a society. Both expressions overlap to a large extent. Therefore, both expressions taken together mean ethical norms required to maintain a general social order.[16] In the context of civil law, the words "public order and good morals" are understood to connote some ethical value. But in the case of TCI, no ethical problem is included.

At a conference of the Society of Japanese International Economic Law, a prominent professor who is an expert on public international law pointed out that there is a slight difference in the meaning of "public order" in public law. However, the author could not find a clear definition of "public order" in the context of public law in Japan.

The press release of 13 May 2008 rebuts the arguments presented by TCI. It states: "...with regard to international commitments, considering that it is allowed to restrict the (foreign investment) in case it is likely to hinder "public order" under Article 3 of the OECD Code of Liberalisation of Capital Movements,[17] this order to abandon is consistent with the existing international rules for the liberalization of inward investments. " There is no definition of "public order" in the Code.

It is not clear how the government understands the meaning of "public order." The business of electric power supply is included in Annex 2 to the 1980 Order

[14] See: http://www.mof.go.jp/jouhou/kokkinn/tci20080513-01.htm, visited on 28 December 2008.
[15] From Translations of Laws and Regulations by Cabinet Secretariat, http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf
[16] Akio Takeuchi and others ed., *New Law Dictionary* 3rd ed., Yuhikaku 1989, pp. 86-87.
[17] Article 3 Public Order and Security
The provisions of this Code shall not prevent a Member from taking action which it considers necessary for:
i) the maintenance of public order or the protection of public health, morals and safety;

No. 1 of Cabinet Secretariat and other ministries regarding Inward Investment. If a foreign investor intends to acquire more than 10 per cent of shares of any one of these listed businesses, it must give prior notice to Ministry of Finance and the ministry with jurisdiction. The list in Annex 2 includes various categories of businesses that have to be examined not only from the perspective of public order but also with various other aspects in mind. However, these aspects are not specified and the list in Annex 2 is a hodgepodge. It lists 129 categories of businesses without indicating the reason for the listing. Therefore, it is not possible to know what kind of business relates to public order in the government's eyes.

In the General Agreement on Tariffs and Trade (GATT) of 1947, there is no reference to the words "public order." However, the General Agreement on Trade in Services ("GATS") states that:

> *Article XIV*
> *General Exceptions*
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
> (a) necessary to protect public morals or to maintain public order (5);

Footnote 5 states that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. However, there is no definition of the words "public order" in the text of GATS. There has been a case fought over the interpretation of "public order" in connection with internet gambling restrictions introduced by the U.S.:
"The U.S.-Gambling decision broadly defined the public-morals exception as " standards of right and wrong conduct maintained by or on behalf of a community or nation." In that case, the Appellate Body upheld the arbitration panel's decision that laws enacted by the United States to combat internet gambling were intended and designed to protect the public morals and maintain public order by targeting certain undesirable social side effects of online gambling, including underage gambling."[18]

In conjunction with the interpretation of Non-Precluded Measures in Bilateral Investment Treaties (BIT), William W. Burke-White and Andreas von Staden wrote:

> "the term ("public order") is rarely defined and may have divergent meanings within domestic legal orders. In domestic law, particularly civil law states, public order often appears under its domestic linguistic labels " ordre public," "orden publico," or "offentliche Ordnung." Some BITs expand the already potentially broad concept of public order by including a separate reference to "law" as a permissible objective. For example, the BIT between China and BLEU adds defense of the state law to the

[18] Destiny Duron Deas, Note: THE COSTS OF PERCEIVED HYPOCRISY: THE IMPACT OF U.S. TREATMENT OF FOREIGN ACQUISITIONS OF DOMESTIC ENTERPRISES, 57 Duke L.J. 1795, 1821.

maintenance of public order as permissible objectives."[19]

Moreover:

> "None of the tribunals ... fully define the contours of the permissible objectives of "essential security" and "public order.""[20] "(T)he term "public order" may have one meaning in a treaty between two civil law states and a very different meaning in a treaty between two common law states. Some may find this range of valid interpretations of similar terms troubling, but it is both appropriate and necessary given that a goal of treaty interpretation is, even within the framework of the Vienna Convention, to give effect to the intent of the parties which entered into the treaty instrument."[21]

Furthermore, Interpretations of the "public order" objective in international contexts similarly suggest a range of possible interpretations of the term. The OECD Draft Convention on the Protection of Foreign Property contained a "public order" type exception, providing in Article 6 that derogations from its substantive provisions would be permissible if a state party was, inter alia, "involved in war, hostilities or other grave national emergency due to force majeure or provoked by unforeseen circumstances or threatening its essential security interests." The commentary provided a few illustrative examples that emphasize security-related aspects of public order, such as "civil wars, riots, or other wide spread civil disturbances" as well as natural disasters, including "storm damage, earthquakes, volcanic eruptions etc. ... with effects on a national scale." The commentary suggests by way of reference that the exception was apparently intended to be reflective of the necessity defense under customary law, but some of the examples appear to go far beyond the normal applications of the customary defense. The ultimately unsuccessful Multilateral Agreement on Investment (MAI) also included a "public order" exception. In a footnote, the draft explained that "the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." There remained disagreement among negotiating states, however, on what would qualify as a "fundamental interest." There appears to have been consensus that the application of a state's criminal laws, anti-terrorist measures, and money-laundering regulations would fall under the "public order" heading, but there was no agreement as to how much broader the exception should be."[22]

4. The Inconsistency of Government Policy

Don Wallace, Jr. and David B. Bailey claim in connection with the interpretation of GATT Article XX, GATS Article VI, and the proposed MAI Article VI, that these exceptions for "public order" and police powers seem to be the key area of contention and public order is vulnerable to being exaggerated beyond reasonable bounds.[23] The biggest problem of this kind of vague and ambiguous

[19] William W. Burke-White and Andreas von Staden, Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, 48. Va. J. Int'l L. 307, 333.
[20] ditto, 337.
[21] ditto, 340-341.
[22] ditto, 358-359.
[23] Don Wallace, Jr. and David B. Bailey, The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions, 31 Cornell Int'l L.J. 615,625.

expression as a criterion for the restriction of foreign direct investment is that such vagueness or ambiguity is open to abuse by protectionist and other interest groups. With regard to the similarly vague notion of "national security," it has been pointed out that the risk of this lack of a clear definition is that it could be exploited by a future protectionist-minded presidential administration to block transactions that would normally not be deemed to be national security threats.[24]

The power of protectionists is strong in Japan. Moreover, there may be incentives for high-ranking government officers to keep private companies under their supervision and control. In many cases, high-ranking officials who leave the government take positions in private companies that they once supervised. Such private companies expect these former officials to influence the supervising government office. Government offices can also benefit by securing positions for senior retiring officials. In Japan, this practice of senior bureaucrats retiring into key jobs in the private sector in fields closely related to their government roles is called "descent from heaven" (*amakudari*).

Because there is no clear and objective criteria of "public order", the reasons for the order to abandon the acquisition of shares by TCI were not persuasive at all.

The reasons for the order to abandon were: (i) TCI's requests to set up ROE and ROA targets of J Power; (ii) the appointment of independent outside directors and TCI's failure to explain why the acquisition by TCI is not harmful to the operation of the Oma Power Plant; and (iii) TCI's failure to explain the actual measures to be taken to prevent TCI from hindering national policy regarding a stable supply of electricity, nuclear power and nuclear fuel recycling.

As a shareholder of a business corporation in the private sector, it is quite natural to request the management to set operational targets for ROE and ROA. Figures of 10 per cent for ROE and 4 per cent for ROA as requested by TCI are not unreasonable. The basic idea of corporate governance is that the shareholders are allowed to try to maximize the shareholder value. In this respect, the request to appoint independent outside directors is also perfectly reasonable. Appointment of outside directors is quite popular in Japan especially among listed large companies. Moreover, these requests may well be proposed by existing shareholders. These requests are not unique to TCI but are to the benefit of all shareholders in general and there is a valid argument that these proposals enhance the shareholder value as a whole. The failure to explain the actual measures to be taken to avoid hindering national policy does not provide evidence of the likelihood of any such hindrance. It would also be extremely difficult to make an assurance of future inaction.

The Ministry of Finance and Ministry of Economy, Trade and Industry explained how the procedures for the examination of the notified acquisition of shares were transparent and fair.[25] At least six members of the Special Committee for the Foreign Exchange Branch of the Council for Tariffs and Foreign Exchange seem to be neutral, judging by the gist of their available discussion.[26]

[24] Matthew R. Byrne, NOTE: Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance, 67 Ohio St. L.J. 849,890.
[25] 3 (3) of Annex No. 1 "With respect to the Order to Abandon" attached to the press release of 13 May 2008.

The Special Committee at its second meeting[27] explained the reason for disapproval in Paragraph 4. It states: "4. If the additional acquisition of shares by TCI is completed, depending upon the actions taken by TCI as a major shareholder, we cannot deny the possibility of an unpredictable influence upon the planning, operation and maintenance of infrastructures in Japan including power lines and upon national nuclear power and fuel recycling, even if we consider the proposals submitted by TCI." Then, it concludes "5. Considering the above, we recognize that there is a likelihood of the impairment of the public order. Therefore, we request the government to take appropriate measures." Paragraph 1 states the importance of inward direct investment to Japan. Paragraph 2 explains the reason why restrictions based on the maintenance of public order are allowed. Paragraph 3 explains how J Power is important to Japan.

The reason stated in Paragraph 4 applies to every acquisition of J Power's shares. Every kind of acquisition of shares with voting rights involves the possibility of affecting the management of the company. This is not a likelihood but rather the fundamental power given to shareholders of a company. No specific reason unique to the proposed acquisition of J Power's shares by TCI is given. After reading the gist of the discussion, the author could not find any persuasive argument for why TCI's investment had to be abandoned, especially when 36 per cent of outstanding J Power shares are already held by foreign shareholders and J Power is a completely privatized company listed in the first section of the Tokyo Stock Exchange. The reason why only the gist of the meeting was published, as is stated in a note to the documentation, was because it related to a specific investment. The author does not believe this to be a sufficient reason.

In the United States, Congress has a keen interest in the examination procedures of the Committee on Foreign Investment in the United States (CFIUS) under the Exon-Florio amendment to protect "national security" from certain foreign investments. In contrast, the Japanese Diet seems to have little interest in the procedures for the examination of investments. Other people in Japan also seem to have little interest in the processes related to the control of inward direct investments.

5. The Real Reason for Disapproval of the Investment

Restriction of foreign direct investment is premised upon the belief that foreigners and foreign corporations are not patriotic and tend to harm the interest of the host country. The validity of this premise needs to be examined carefully.

If this premise is true, it may be reasonable for the Japanese government to try to protect a Japanese company operating nuclear power plants and performing a vital role in the operation of nuclear recycling. The question that then arises is why did the Japanese government allow J Power to be privatized and make it a listed company thereby allowing foreigners to own 36 per cent of shares? What if the Japanese shareholders of J Power requested the same proposals, such as

[26] http://www.mof.go.jp/singikai/kanzegaita/gijiyosi/a200415.htm, visited on 30 December 2008.
[27] http://www.mof.go.jp/singikai/kanzegaita/tosin/gaishibukaiiken.pdf, visited on 6 January 2009. Also the gist of the first meeting can be found at http://www.mof.go.jp/singikai/kanzegaita/gijiyosi/a200411.htm, visited on 6 January 2009.

setting ROE and ROA targets or the appointment of outside directors? This is perfectly possible. The government might have expected more passive shareholders who were only interested in the ups and downs of the stock price, rather than more activist shareholders.

It is likely that the reason for the order to abandon the TCI proposal was based on the threat to national security but not public order. However, Annex 1 attached to the Public Notice No. 1 of the Cabinet Office and other ministries of 7 September 2007 lists only manufacturing businesses as those affecting national security. It is quite possible that J Power does not engage in manufacturing business.

The most appropriate means of protecting J Power and other businesses that affect national security or have a vital role in the maintenance of public order, is the requirement for these companies to be Japanese, owned and operated by Japanese citizens only.

For example, the Atomic Energy Act of 1954 of the United States, 42 U.S.C. Sec. 2133 (d) states that:

Limitations. ..... No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Or, the Federal Aviation Act of 1958 U.S.C., which defines a citizen of the United States and excludes foreigners from engaging in various aviation businesses:

(15) "citizen of the United States" means--

(A) an individual who is a citizen of the United States;

(B) a partnership each of whose partners is an individual who is a citizen of the United States; or

(C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 per cent of the voting interest is owned or controlled by persons that are citizens of the United States.

The Japanese government should have enacted a similar statute if it genuinely wanted to protect J Power from foreign ownership. In this case, it seems to the author that the government tried to recover from its past mistake of privatizing J Power without anticipating activist foreign shareholders. Necessity makes for bad law.

6. Conclusion

It may be reasonable to restrict foreign investment into nuclear power plants in

light of its sensitive nature and the examples of other countries. However, it is not consistent with the complete privatization of J Power. If the government wanted J Power to follow its policies irrespective of the legitimate exercise of shareholders' rights to maximize the shareholder value as they like, it should not have privatized J Power completely. Because of this inconsistency, the government's reasoning behind the order to abandon the acquisition is not persuasive and it smacks of a lack of both transparency and fairness. Even though the outcome might be appropriate, the inconsistency, poor reasoning and lack of transparency will further discourage foreign investment into Japan.

The Japanese government may have noticed this mistake. *Nihon Keizai Shimbun* (Japan Financial Paper) reported on December 28, 2008 as follows:

> The government will review the regnlations of foreign direct investment into Japan regarding all kinds of businesses, in order to increase investment. ... Present Foreign Exchange Control Act requires the foreign investors to apply prior permission of the government if they try to acquire not less than 10% of outstanding shares of domestic companies engaging in certain kinds of businesses including electric power supply, manufacturing of arms and nuclear power. ... The Act encompasses broad areas of businesses including agriculture, forestry, fishery, rail road, and a part of manufacturing — not only those directly affecting national security. For this reason, it was criticized so that the scope and reasons of restrictions should be clearer. Each ministry will review the scope of regulated businesses. If each ministry intends to continue the restriction on foreign investment, it will offer reasons for restrictions that may be persuasive to foreign investors.[28]

[28] The government will consider if it should review the restrictions on foreign direct investments under Foreign Exchange Control Act, *Nihon Keizai Shimbun* December 28, 2008 (Sunday) page 3.

Exhibit 6

harmonization of competition laws either in the OECD or in the GATT. It may be said that the reform of the AML on the basis of the SII is only a forerunner of such harmonization.[13]

2.3 An Overview of the Anti-monopoly Law

The major provisions of the AML are applied to the following three categories of conduct: (1) private monopoly, (2) unreasonable restraint of trade, and (3) unfair business practices. The purpose of this section is to provide a detailed analysis of these three categories. However, it is useful to give an overview before examining them in detail.

A. PRIVATE MONOPOLY

Private monopoly is defined in Article 2(5) of the AML. Under this article, if a powerful enterprise either 'controls' or 'excludes' the business activities of another enterprise or other enterprises and thereby brings about the condition in a market where competition is substantially restrained, the enterprise is regarded as committing a private monopoly. Private monopoly is prohibited under the former part of Article 3. Examples of private monopoly include the acquisition by a powerful enterprise of stocks or assets of another enterprise in competitive relationship whereby the acquiring enterprise controls the business activities of the acquired enterprise, and the contractual terms imposed by a powerful manufacturer on distributors of the product it produces thereby exclude competing manufacturers from the distribution network. If conduct such as the above is carried out by a powerful enterprise and competition in the relevant market is substantially restrained, the enterprise would be accused of having monopolized the relevant market.

There are several provisions which are related to the prohibition of private monopoly. Provisions contained in Articles 9–18 of Chapter 4 of the AML are devoted to the control of mergers and acquisitions. Article 9 prohibits the establishment of holding companies which are defined as companies whose main business is to own stocks of other companies to control them, Article 9.2 sets an upper limit to the value of the stocks of companies which a large-scale company can acquire and hold, and Article 11 prohibits, with some exceptions, financial companies (companies in banking, securities, and insurance) from acquiring and owning more than 5 per cent of the outstanding stocks of another company.

Article 11 prohibits companies from acquiring and owning stocks of

[13] See generally Matsushita, 'The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation', *Michigan Journal of International Law*, 12/2 (1991), 436 *et seq.*

another company or other companies if, as the result of such acquisition and holding, competition in a market tends to be substantially restrained. Article 13 prohibits interlocking directorates if they tend substantially to restrain competition in a market. Article 15 prohibits a merger between companies if by such a merger competition in a market tends to be substantially restrained.

The purpose of these provisions is to arrest the tendency towards concentration of economic power in a market and, in this sense, it may be said that the provisions in Chapter 4 of the AML are designed to operate as 'precautionary measures' in relation to the prohibition of private monopolies.

Article 2(7) of the AML defines a 'monopolistic situation'. In this, a monopolistic situation exists if an enterprise occupies a market share of 50 per cent or above, or two enterprises 75 per cent or more in a product market, new entry into this market is difficult, and the price and profit rate of these enterprises or their general expenses and other expenses are excessively high. The FTC can issue an order to a monopolistic enterprise to restore competition in a market including, in extreme cases, a deconcentration measure whereby the enterprise is broken up into several competing units.

The control of a monopolistic situation is not premissed on 'a wrongful conduct' of an enterprise. As long as there is the monopolistic structure and other requirements as above described, a deconcentration order may be issued. Therefore, this control is a control of structure rather than a control of conduct. This can be regarded as a supplementary measure to the prohibition of private monopolies in the sense that there may be a monopolistic situation without any wrongful conduct which amounts to a private monopoly and yet competition in a market may not exist any more due to a monopolistic or oligopolistic market structure.

B. UNREASONABLE RESTRAINT OF TRADE

Article 2(6) of the AML defines unreasonable restraint of trade as an agreement or arrangement among enterprises to the effect that they mutually refrain from competing with each other with regard to a product or service. By definition, an unreasonable restraint of trade is a cartel. A cartel is prohibited by the latter part of Article 3. Cartels can be created through the decisions of trade associations as well as by agreements among enterprises. Therefore, the AML provides in Article 8(1) for the prohibition of restrictive conduct engaged in by a trade association.

When a cartel fixes prices or otherwise affects prices, the FTC must impose on the parties concerned an administrative surcharge. Similarly, when enterprises in a market simultaneously raise their prices, the FTC

can demand the reasons. Although this is not a control of cartels as such, it is a measure related to the prohibition of cartels.

Some cartels are exempted and authorized by law. They include depression cartels, rationalization cartels, export and import cartels, small business cartels, and ocean freight conferences. Some of these cartels will be more closely examined when we look at legal aspects of industrial policy. When we study the law on cartels, it is necessary to examine the legal rules that permit cartels by way of exemption as well as those which prohibit them since there are many such authorized cartels.

C. UNFAIR BUSINESS PRACTICES

The third category of conduct which is prohibited by the AML is unfair business practices. They are defined in Article 2(9) and prohibited by Article 19. According to Article 2(9), the FTC is required to designate unfair business practices. In Notification 15 of 1982, the FTC designated sixteen items. They will be covered in subsequent sections so we will only lightly touch on them here.

Article 2(9) states that the FTC shall designate unfair business practices within six basic categories: (1) unreasonable discrimination, (2) a transaction with unreasonable pricing, (3) unreasonable inducement of customers or coercion of customers, (4) unreasonable restriction imposed on the other party to the transaction, (5) abuse of a dominant position in the transaction, and (6) unreasonable interference in the internal matters of competitors.

Unreasonable discrimination includes conduct such as a boycott, a refusal to deal by a single enterprise, and price discrimination. A transaction with unreasonable pricing is typically a sale below the cost of production or of purchasing. Unreasonable inducement of customers is exemplified by a false or misleading advertisement or representation and offering excessive premiums when an enterprise sells a product. Unreasonable coercion of customers is generally a tie-in sale whereby the seller of a product sells the product with the condition that the purchaser purchases another product or other products. Unreasonable restriction imposed on the other party to the transaction includes various conducts of which the typical ones are a resale price maintenance, an exclusive dealing arrangement, a vertical territorial restriction, and customer restriction. Abuse of a dominant position means that an enterprise with a stronger position *vis-à-vis* the other party to the transaction imposes harsh conditions on the other party. Unreasonable interference in the internal matters of competitors includes interfering with transactions between a competitor and its customers and inducing stockholders of a competitor to act against its interests.

It can be stated that the importance of the prohibition of unfair business practices lies in the following two areas. First, the control of unfair business practices is regarded as a precautionary measure in relation to the prohibition of private monopolies. The theory is that, if unfair business practices were allowed to continue with impunity, there would be a gradual concentration of economic power in the hands of those who practise them and the concentration of economic power would be the seed-bed of private monopolies. Therefore, it maintains that it is necessary to apply the prohibition on unfair business practices with the view to preventing private monopolies.

Beside the above, however, prohibition of unfair business practices is part of the law of consumer protection. For that matter, the whole AML is part of the law of consumer protection. However, this is especially true with the control of such unfair business practices as the prohibition of false and misleading advertisements, resale price maintenance, and a tie-in deal whereby consumers are forced to buy products tied to the product which is the main object of the transaction. Also the prohibition of unfair business practices is part of the law of small business protection. This is especially true with regard to the prohibition of the abuse of a dominant position in which the party to a transaction with superior bargaining power imposes harsh conditions on the other party to the transaction. Of course, the small business protection law has a much wider scope. However, the prohibition of unfair business practices by the AML is an important part of it.

There are two supplementary laws. One is the Law to Prevent Unreasonable Representation and Unreasonable Premiums[14] and the other is the Law to Prevent Unreasonable Delay in Payment to Subcontractors and Related Matters.[15] The contents of those two supplementary laws will be touched upon in a later section of this chapter. It is sufficient here to mention that, while the provisions of the AML are general, they specifically designate conduct which should be prohibited and provide for a more expedited procedure for enforcement.

2.4 The Basic Concepts of the Anti-monopoly Law

There are several important concepts in the AML which are common to different types of regulation under the AML. To avoid repetition in later sections, these basic concepts are explained below all together.

[14] Futōkeihinrui Oyobi Futōhyōuji Bōshi Hō, Law 134, 1962.
[15] Shitaukedaikin Shiharai Chien Boshi Hō, Law 120, 1956.

A. ENTERPPRISE

In principle, the AML is applied to an 'enterprise'.[16] Article 3, which prohibits private monopoly and unreasonable restraint of trade, states that enterprises shall not engage in private monopoly or unreasonable restraint of trade. Similarly, Article 19, which prohibits unfair business practices, also states that an enterprise shall not engage in unfair business practices. There are some exceptions, such as Article 10, which controls the acquisition by a company of stocks of another company and Article 15 which controls a merger between companies, which states that 'companies' are the object of regulation. Likewise, Article 13 prohibits directors and employees of a company from being in the position of director of another company, if to do so would tend substantially to restrain competition in a market. However, generally, enterprises are the object of regulation under the AML.

An 'enterprise' is defined in Article 2(1) as 'person who carries on business of a commercial, industrial, financial, or any other nature'. Commercial, industrial and financial businesses are but a few examples of business enterprises. Activities of 'any other nature' include agriculture, services, and research and development. In short, business engaged in by an enterprise comprises a wide variety of activities. Although the major parts of such business activities are profit-making activities, they are not necessarily limited to such. As long as an enterprise is an active participant in a market, the business activity engaged in by such business is regarded as coming under the definition of Article 2(1).

Of course, profit-making companies are central to the concept of enterprise as defined in Article 2(1). However, an enterprise in this Article is not necessarily limited to a profit-making enterprise. For example, co-operatives established by laws such as the Agricultural Co-operatives Law[17] and the Medium and Small Enterprises Organizations Law[18] are prohibited from engaging in profit-making activities. However, they do engage in continuously buying and selling products and are active participants in a market. Therefore, they are enterprises under the definition of Article 2(1). As long as an entity participates in a market by way of selling, buying, or otherwise, regularly, continuously, and repeatedly, the entity is qualified as an enterprise in the sense of Article 2(1).

Recently some questions were raised as to whether or not activities of professionals and educational institutions are business activities in the sense of Article 2(1). The FTC decisions answered them in the affirmative. Some examples are given. There are a number of FTC decisions in

[16] In Japanese, it is 'jigyōsha'.
[17] Nogyō Kyōdō Kumiai Hō, Law 132, 1947.
[18] Chūshōkigyō Dantai Hō, Law 185, 1958.

which the issue was a restrictive condition imposed by medical associations on newly opened medical clinics, such as the restriction of the location of a newly established clinic to the effect that the new clinic must be located a certain distance away from existing ones. The FTC held such a restriction as unlawful on the ground that medical associations were trade associations and the move on the part of medical associations stated above violated Article 8(1) of the AML, which prohibits trade associations from engaging in activities which restrain competition substantially.[19] The premiss of these decisions was that medical doctors and clinics which made up the medical associations were enterprises in the sense of Article 2(1).

In the *Architect Association* case,[20] an association composed of architects was accused by the FTC of establishing a minimum fee schedule. The FTC proceeded against this association on the theory that it was a trade association. Here again the premiss of the FTC's challenge was that architects who made up the Association were enterprises in the sense of Article 2(1). This case was settled between the FTC and the respondents.

Once it is established that medical doctors and architects are enterprises in the sense of Article 2(1), other professionals such as lawyers, accountants, and independent business consultants also become enterprises. This extends to educational institutions and vocational schools.

Enterprise is a functional concept and the form of enterprise does not matter. So it makes little difference whether a given enterprise is a joint-stock corporation, a non-profit making entity, or an individual. As long as an enterprise is actively participating in a market, it qualifies as an enterprise in the sense of Article 2(1) of the AML.

B. TRADE ASSOCIATIONS

Trade associations play a very important role in business activities in the Japanese economy. There are trade associations in virtually all fields of business—the Steel Alliance in the steel industry, the Automobile Industry Association in the car industry, and so forth. Generally their work involves gathering business information, formulating industrial standards, acting as the channel through which enterprises in the industry petition the government, and engaging in activities that relate to a social cause (such as the campaign for the elimination of industrial pollution). Also some anti-competitive activities are carried out by trade associations. Consequently, the AML provides for the regulation of trade

[19] See, for details, Matsushita, *Keizaihō Gaisetsu* (*Introduction to Economic Law*) (Tokyo, 1986), 40–4.

[20] In re Nihon Kenchikuka Kyōkai Case, FTC Decision, 19 Sept. 1979, *Shinketsushū*, 265 (1980), 25 *et seq.*

associations. Article 8(1) provides that trade associations shall not engage in cartel-like activities and unfair business practices. They will be analysed in a later section. Here we will deal with the definition of trade associations.

Article 2(2) of the AML defines a trade association as: 'any combination or federation of combinations consisting of two or more enterprises and having as its principal purpose the furtherance of the common interest of its members . . .'. Organizations such as associations, foundations, and co-operatives are included within this category.

Sometimes an entity has the dual character of an enterprise and a trade association. For example, a farmers' co-operative is an entity composed of farmers for the purpose of furthering their common interest and so is a trade association. At the same time, the co-operative engages in selling and buying and, as long as it is engaged in market activities in such a way, it is regarded as an enterprise.

C. PARTICULAR FIELDS OF TRADE

In General

In order to determine whether a private monopoly or an unreasonable restraint of trade occurs, or a merger or acquisition of stocks by a company of another company tends substantially to restrain competition, it is necessary to decide the scope of the market in which such conduct occurs. In other words, a market must be determined in which anti-competitive conduct takes place. For example, a merger between companies which together occupy 80 per cent of the market would probably restrain competition. The question, however, is what is the market of which the two companies hold an 80 per cent market share. Even if those two companies occupy 80 per cent of the market when only a single product is taken into consideration, there may be other competing products, and if all those are taken into consideration the market share of the two companies may be only 10 per cent or less.

Therefore, it is necessary to determine the market in question and, in the AML, a market in this sense is referred to as 'a particular field of trade'. Although it is impossible to define it with mathematical exactitude, we can discuss some general criteria which are useful.

Product Markets

One criterion is the product market. One test is to determine whether a commodity or service is a substitute for another commodity or service. Theoretically, if there is 'cross-elasticity of demand' or 'reasonable interchangeability' between two or more products, they can all be substituted

for each other and together they constitute a particular field of trade.[21] In the *Chūōseni-Teikokuseima* case,[22] there was a merger between two companies which occupied more than 70 per cent of the market for hemp yarn rope. However, if rope made of hemp yarn and that made of chemical fibre were put together, the market share of these two companies was less than 10 per cent. The FTC regarded rope made of hemp yarn and that made of chemical fibre as interchangeable and decided not to challenge the merger.

If a product is highly differentiated by brand name, grade, and prestige, there may be several sub-products within a product. For example, a cosmetic product of a high grade is differentiated from a product of lower grade since they have different customers.[23] In such a case, a sub-product constitutes a particular field of trade.

Geographical Markets

Even if two enterprises are engaged in the same business, there is no competition if the locations of their business are so far away from each other that competition is impossible. A geographical market is the geographical area in which competition takes place. There is no standard which can be applied uniformly to every case. However, generally, a geographical market in retail business is narrow and that in manufacturing and wholesale is wide.[24] When the FTC announced the guidelines on mergers and acquisitions in the retail industry, the FTC stated that the administrative boundaries of a city would be regarded as a particular field of trade in retail business except for the six large cities for the purpose of reviewing mergers and acquisitions.

D. SUBSTANTIAL RESTRAINT OF COMPETITION

Competition

There is a definition of competition in Article 2(4) of the AML which states that competition is:

> a situation in which two or more enterprises do or may, within the normal scope of their business activities and without undertaking any significant change in their business facilities or kinds of business activities, engage in any one of the following acts, (i) supplying the same or similar goods or services to the same consumers

[21] *United States* v. *E.I. du Pont de Nemours & Co.*, 351 US 377 (1956).

[22] See Kōseitorihiki Iinkai (The Fair Trade Commission), n. 5, above, pp. 199–202.

[23] *United States* v. *Guerlain, Inc.*, 153 F. Supp. 77 (SDNY 1957).

[24] In 1981, the Fair Trade Commission announced a set of guidelines titled 'On Mergers and Acquisitions in Retail Business' in which the Commission states that a particular field of trade in retail business is the city as an administrative unit or an area which is slightly larger than that except for the cases of large cities.

or customers; (ii) obtaining supplies of the same or similar goods or services from the same supplier.

From the wording 'may . . . engage', we can infer that potential competition as well as actual competition is included. Also it is clear that competition in the AML includes not only that among sellers but also that among purchasers.

Substantial Restraint of Competition

In several key provisions of the AML, the words 'substantial restraint of competition' appears. For example, in Articles 2(5) and 2(6), which define private monopolization and unreasonable restraint of trade, and Articles 10 and 15, which control acquisition of stocks and a merger respectively, these words are used. There must be a *substantial* restraint of competition (rather than a mere restraint of competition) when these provisions are applied.

According to a decision of the Supreme Court,[25] competition is substantially restrained if an enterprise or a group of enterprises can determine prices and other terms of business independent of market forces. This means that there exists a situation in which an enterprise or a group of enterprises have dominant power in a market and the price and other terms of business can, at least up to a degree, be manipulated by them.

Whether this situation exists or not must be decided on the basis of the specific set of facts involved in each case. Therefore, it is difficult to present the tests which can be applied uniformly to all cases. The FTC announced the guidelines concerning the regulation of mergers and acquisitions.[26] In those guidelines, the FTC states that the following tests are used. If there are these situations when a merger or acquisition is consummated, the merger or acquisition will be closely scrutinized: (1) if the market share of one or both of the parties to the merger is above 25 per cent, (2) if the ranking of the company in terms of market share after the merger is at the top and the market share is above 15 per cent, (3) if the ranking in terms of market share of the company after the merger is at the top and the difference in terms of market share between that company and other companies is great.

The above quantitative tests are only general guidelines by which the

[25] The Tōhō-Shintōhō case, Decision of the Supreme Court, 25 May 1954, *Minshū*, 8/5 (1954), 950 *et seq.*

[26] The merger guidelines by the Fair Trade Commission are entitled 'Administrative Procedure Standards for Examining Mergers, etc. by Companies (1980)' and included in Nakagawa, n. 3, above, pp. 79 *et seq.* and the guidelines on stockholdings are entitled 'Standards for Examination of Stockholding by Companies (1981)' and included ibid. 89 *et seq.*

FTC proceeds in investigating cases of mergers and acquisitions. They are by no means the conclusive criteria by which to judge that competition in a market is substantially restrained. Also there may be a need to use somewhat different methods when judging whether a cartel restrains competition substantially or a merger restrains competition substantially. However, the above figures may give a good starting-point even if they do not provide the conclusive tests when considering whether a merger, the creation of a monopoly or a cartel, or the activity of a trade association restrains competition substantially.

E. THE PUBLIC INTEREST

In General

The words 'contrary to the public interest' appear in two provisions in the AML: Article 2(5) (private monopolization) and Article 2(6) (unreasonable restraint of trade). There is an acute difference of views with regard to the meaning of this term with respect to Article 2(6). Although the words are used in Article 2(5), their meaning has never been the subject of debate. The reason is that whether or not the creation of a private monopoly is held illegal depends on the conditions of the relevant market, the powers of the accused party compared with those of competitors, the ease or difficulty of new entry, the possibility of imports and other forms of international competition, as well as many other economic factors, and the issue of whether a monopolization is contrary to the public interest can be adequately considered in connection with these factors.

However, when the FTC or courts have to decide whether an unreasonable restraint of trade (a cartel) is illegal or not, they must consider whether a cartel agreement is contrary to the public interest. To put it simply, the question is: can you hold a cartel agreement as illegal when it substantially restrains competition or should you prove that the cartel is contrary to the public interest *in addition to the fact that it restrains competition substantially*?

The Views of the Fair Trade Commission and the Majority of Commentators

The FTC and the majority of commentators[27] assert that 'contrary to the public interest' provided in Article 2(6) is the same as 'substantial restraint of competition' in the same article. In their view, the term 'contrary to the public interest' has no independent meaning apart from 'substantial restraint of competition'. The reason is that the basic philosophy of the

[27] See Matsushita, n. 19, above, pp. 57–67.

AML is the maintenance of competition and, therefore, public interest in the AML should be regarded as competition as such. Therefore, if competition is substantially restrained by a cartel, the public interest is injured by that very fact. This view also maintains that, if 'contrary to the public interest' is something other than 'substantial restraint of competition', in order to prohibit a cartel the FTC or the courts would have to prove that (1) the cartel restrains competition substantially *and* (2) the cartel is contrary to the public interest in other ways. This would make the prohibition of cartels very difficult. This view has been strongly influenced by the *per se* illegality doctrine developed in United States antitrust laws with regard to cartels.[28]

The View of the Business Community

There is a different view expressed by the Keidanren (the Federation of Economic Organizations) which represents the opinion of at least part of the business community.[29] Although the MITI has not officially expressed its view as to how the meaning of 'contrary to the public interest' should be interpreted, some of the private writings by MITI officials take the same point of view.[30] This view, in short, holds that the public interest in the AML includes not only competition but also other economic and social goals such as the measures to deal with pollution, depression, and preservation of morals as well as the protection of consumers and other social values. Once an agreement among enterprises to increase international competitiveness was regarded as one of such goals but not any more.

The holders of this view argue that a cartel or an agreement among enterprises to eliminate competition among themselves should not be held as a violation of the AML simply because it restrains competition substantially. There may be situations in which competition is substantially restrained but agreement to do so may serve a useful social purpose. For example, an agreement among enterprises jointly to cut back production in a depression serves the useful purpose of avoiding bankruptcy and preserving enterprises in the market even if competition among them is substantially restrained.

The View of the Supreme Court

The Supreme Court expressed its view of the meaning of 'contrary to the public interest' in the *Oil Cartel Price Fixing* case.[31] The Supreme Court took a middle-of-the-road approach and synthesized the above two

[28] *United States* v. *Socony-Vacuum Oil Co.*, 310 US 150 (1940).
[29] See Matsushita, n. 19, above, p. 60.
[30] See n. 29, above.
[31] Decision of the Supreme Court, 24, Feb. 1984, *Keishū*, 38/4(1984) 1287 *et seq.*

approaches. According to its view, the public interest in the AML is in principle the maintenance of competition, but there are exceptions. It states that 'contrary to the public interest' means in principle a situation in which competition is substantially restrained but there can be an exceptional situation in which an agreement among enterprises restrains competition substantially but has sufficient redeeming virtue to hold it lawful. In this situation, the FTC and courts should weigh the advantage of maintaining competition against what would be accomplished by such an agreement, and, if the advantages which accrue from the agreement are greater than those which would be accomplished through maintaining competition, the agreement should be held as not contrary to the public interest even though it restrains competition substantially.

The Supreme Court did not specifically show what those redeeming virtues should be. One can speculate, however, that the Supreme Court had in mind factors such as avoidance of pollution, preservation of good morals, and elimination of danger to public safety. Therefore, for example, if an agreement among enterprises is aimed at abolishing a substance which causes environmental pollution or a food additive which may be injurious to the human body, or is aimed at prohibiting publication of obscene literature, it may be regarded as having a sufficient redeeming virtue even if the agreement restrains competition among the participants substantially in the particular field of trade concerned.

Commentary

It seems that the view taken by the Supreme Court is the most balanced and appropriate one. The view taken by the FTC and the majority of commentators is pure and faithful to the philosophy of competition. However, if this interpretation is applied uniformly and without any exception at all, the result may not be a desirable one. For example, there could be a situation in which manufacturers of insecticide conclude an agreement whereby they jointly decide not to use an additive which may be a hazard to the environment and to public health. If the use of this substance is totally eliminated by this agreement, competition in purchasing the substance is abolished. At the same time, competition in selling the insecticide which contains this substance is eliminated. However, one can hardly say that this agreement should be prohibited by the AML. If one were to apply the prohibition to any agreement among enterprises which restrains competition without exception, this would be too stiff and inflexible.

On the other hand, the view held by the Keidanren seems to be too vague. In its view, there is no limitation to the scope within which the public interest in Article 2(6) of the AML should be interpreted. This will create instability in interpretation and, since a violation of Article 2(6)

and Article 3 of the AML can be a criminal offence, an undefined scope for the interpretation of the public interest in Article 2(6) is highly undesirable. Also, if this view were to be adopted, it would indeed be difficult to prohibit cartels and collusive agreements since there are always some reasons for these as the proponents of the view of the FTC and the majority of commentators fear.

Compared with the two interpretational doctrines above, the view of the Supreme Court seems to be more balanced. It is based on the premiss that competition is the basic value in the AML and, therefore, this view is faithful to the philosophy of competition. It is also flexible in the sense that it allows some exceptions to the rule of competition if it is absolutely necessary for the purpose of accomplishing something of social or economic value. It should be emphasized that, in this doctrine, the prohibition of cartels and similar collusive activities is the principle and exceptions are allowed only in those situations where the valid reason for an agreement which restrains competition is sufficiently vindicated, and that therefore this doctrine is closer to the view of the FTC and the majority of commentators than to that of the Keidanren.

However, as mentioned before, the scope of exceptions to the rule of competition is not clear from a reading of this decision yet. This decision merely declares the general principle and a general direction to which the FTC and courts should look to reach a right and stable interpretational doctrine. Therefore, it is probably correct to say that the question of what should be the right kind of interpretation of the public interest in Article 2(6) is not settled yet.

2.5 The Enforcement Agency and the Procedure of the Anti-monopoly Law

A. THE FAIR TRADE COMMISSION AND ITS ORGANIZATION

In General

The enforcement of the AML is entrusted to the FTC and the courts. In brief, the FTC has the power to investigate suspected violations, hold an administrative hearing about the case, and determine whether there is a violation or not. A decision of the FTC is reviewable by the Tokyo High Court and the Supreme Court.

There are three types of legal consequence to a violation of the AML. First, the FTC proceeds against the violation and issues a cease-and-desist order. The FTC issues an order to impose an administrative surcharge on a party which is held to have engaged in a price cartel or any other cartel affecting price. This is an administrative process.

The second is an action by a private party to seek the recovery of damages sustained by the party on account of a violation of the AML. A private damage action can be brought under either Articles 25 and 26 of the AML or Article 709 of the Civil Code as a tort claim. Third, some violations of the AML are punishable as crimes. Among the above three, the administrative process by the FTC is most frequently used.

The Organization of the Fair Trade Commission

The FTC is an independent administrative commission and the agency created for the purpose of the enforcement of the FTC. Officially, the FTC is part of the Prime Minister's Office (see Fig. 2.1). However, no agency, including that of the Prime Minister, can exercise control over the decision-making of the FTC and, therefore, its independence with regard to the determination of violations, the choice of measures to be applied, and other forms of exercise of the enforcement power is guaranteed. The FTC is composed of one Chairman and four commissioners. Candidates for the Chairman and commissioners must be persons aged 35 or above and possess knowledge of law and economics. They are appointed by the Prime Minister with the consent of the House of Representatives and the House of Councillors, and the appointment of the Chairman must be certified by the Emperor. The term of office for the Chairman and the commissioners is five years. There is a secretariat attached to the Commission which has various sections and divisions.

As stated above, the appointment of the Chairman and commissioners is made by the Prime Minister with the consent of both Houses of the National Diet, and the budget of the FTC is, of course, decided by the National Diet. In this way, the appointment of the Chairman and commissioners can be influenced by political forces. The FTC must report its activities to the National Diet annually. However, once the appointments have been made and the budget has been decided, the FTC is independent from other administrative powers and political influences except for the fact that its decisions are reviewable by the courts.

The Powers of the Fair Trade Commission

The powers of the FTC can be classified into three categories: (1) administrative power, (2) quasi-legislative power, and (3) quasi-judicial power. The quasi-judicial power is that of enforcing provisions of the FTC by holding particular conduct as a violation of the AML and issuing an order which would impose on the violating party the obligation to refrain from the conduct. This is probably the core of the powers of the FTC. We will examine it in a later section. In this section, we will examine the administrative power and the quasi-legislative power.

The administrative power includes a variety of powers such as the

Exhibit 7

tion such as requiring evacuation has the character of an administrative action, whether this case fulfills the specially required conditions needed in obligation-making suits, and whether the defendant is qualified to be a defendant.

Judges: Yasuyuki Suzuki (presiding)
Yukio Oota
Shuichi Kato

Foreign Trade — Illegal Export — COCOM Rules — Violation of Foreign Exchange and Foreign Trade Control Act

Tokyo District Court, Judgment, 22 March 1988, Case No. *wa*-1547 (1987). *The Hanreijiho* (Judicial Reports) No. 1271, pp. 30 et seq.

The State of Japan v. Toshiba Machine Co., and others

An outline of the defendent Toshiba Machine Co. (hereinafter, "defending company") and the personal histories of the defendents X and Y:

Shibaura Machine Maufacturing Company (established on 18 March 1949) merged with Shibaura Machinary Company on June, 1961. Shibaura Machine changed its trade name to Toshiba Machine Co., and placed its head office in 4-2-11 Ginza, Chuo-ku, Tokyo. The company's business objective was to manufacture and sell machine tools, textile machines, electric machines, electronic machines and their parts. The company is one of the country's leading machine tool manufacturers, and employs about 3,700 workers with a capital stock of ¥7,361,347,140.

Masanobu Hisano worked as the representative director of the defending company from June 1977 to 28 June 1983. Kazuo Iimura took over after Hisano from the date of Hisano's resignation until 15 May 1987. The defending company has the following departments, each in charge of its own functions: the machine tool export department (known as the No. 1 Export Department until 1982), within the overseas headquarters, in charge of exporting machine tools; the machine tool production department, which plans and manufactures the machine tools; the electric control department, in charge of the numerical control device (hereinafter, "NC device").

The defending company began in 1975 exporting machine tools to Communist countries, especially the Soviet Union and Rumania, in order to make up for decreasing demand for machine tools triggered by the Oil Shock. By 1976, the defending company set up an efficient and successful manufacturing plan, "The SR Project," named for the

initials of the two above-mentioned countries. The defendents X and Y both took part in this project.

Exporting to Communist countries as the Soviet Union has the following merits: There is a stable demand under girded by a planned economy; orders are efficiently taken directly from a public corporation; because the other party of the trade is a nation, collection of payment is reliable; and there is less demand for services after the transaction. However, there were disadvantages, as the restriction in conducting the trade, the speciality of contract conditions, regulations under the Coordinating Committee for Export Control (hereinafter, COCOM), and regulations under the Foreign Exchange and Foreign Control Act together with related Cabinet orders and ministerial ordinances (hereinafter, Foreign Exchange Ordinance).

(Facts resulting as crime)

The defendent Toshiba Machine Co., placing its head office at 4-2-11 Ginza, Chuo-ku, Tokyo, is a resident which produces and sells machine tools. The defendent X, director of the machine tool business department, was engaged in manufacturing machine tools. The defendent Y, section chief of the overseas business department, was engaged in selling machine tools. The defendants X and Y have:

1. Conspired with Akihiko Yuasa in exporting cutter heads for the nine-axis propeller milling machine (a numerical control device that operates when a pair of five-axis controlling machines share a single control axis, as a whole machine working as a nine-axis controlling machine) to the Union of Soviet Socialist Republics without obtaining the approval of the Ministry of International Trade and Industry. Although exporting to the Soviet Union requires the consent of the Minister of International Trade and Industry, X and Y shipped 12 cutter heads (manufacturing cost evaluated at ¥23,360,000) without legal exemption and the Minister's consent, from Daikoku wharf, in Tsurumi ward, Yokohama, Kanagawa Prefecture, to the Ilichevsk Bay in the Soviet Union on the 20th of June 1984.

2. Conspired with Yuasa and Toru Suzuki, while aware that the approval of the Minister of International Trade and Industry was necessary for giving technical skills for the usage of nine-axis propeller milling machine and electric calculator, to export to the non-residing All Soviet Public Corporation for Import of Technological Machine around 1 July 1984 the parts for a nine-axis propeller milling machine and computer programs to operate the machine and electronic calculators (parts programming manual, computer programs manual and source program list worth ¥739,000) without legal exemptions and the consent of the Minister. They used Kinya Ikeda, an employee of Mitsui Bussan Co., who did not know of the circumstances, to carry the parts and programs to

the branch office of Wako Koeki Co. in Moscow, through Kazuo Kumagai, then an employee of Wako Koeki Co. Around 6 July 1984, Suzuki delivered and supplied the goods to an employee of a Baltic plant in Leningrad, appointed by All Soviet Public Corporation for Import of Technological Machine, at the above branch office in Moscow. Consequently, they had dealings without the permission of the Minister of International Trade and Industry.

Held: A fine of 2 million yen for the defendent, Toshiba Machine Co. An imprisonment of 10 months for the defendent X, and a prison term of 1 year for the defendent Y. The defendents X and Y will each be placed on probation for three years from this date of the court's decision.

Upon grounds stated below:

(Application of Law)

1. Criminal Law Article 60; Article 73, clause 1, Article 70 clauses 29; Article 48 clause 1 of the Foreign Exchange and Foreign Trade Control Act before its revision by Article 8 of the additional clause from 1987 Law No. 89; Article 1 clause 1 no. 1, table 1 clause 115 of Export Trade Control Ordinance before its revision by Article 5 of additional clause from 1987 Cabinet Order No. 373; provided that at the time of the act the same rules of Export Trade Control Ordinance before its revision applies, by the 1985 Cabinet Order No. 7.

2. Criminal Law Article 60; Article 73 clause 1, Article 70 clause 20, Article 25 clause 2 of Foreign Exhcange and Foreign Trade Control Act before its revision, by Article 8 of the additional clause from 1987 Law No. 89; Article 17 clause 2, clause 15 and 20 of the table of Foreign Exchange Control Ordinance (Export Trade Control Ordinance, table no. 1 clause 115); provided that at the time of the act, Article 18 clause 1 no. 4 of Foreign Exchange Control Ordinance before its revision, by the 1987 Cabinet Order No. 373, and Article 9 of Ministerial Ordinance concerning the Control of Invisible Trade, before its revision by the 1985 Ministerial Ordinance of the Ministry of International Trade and Industry No. 4 (table clause 4, table 1 clause 115 and 165 of Export Trade Control Ordinance before its revision, by the 1985 Ministerial Ordinance No. 7) apply.

(Reasons for Penalty)

1. This case deals with the defending company, the country's top manufacturer of large-sized vessels, and its technical skills, in violation of COCOM rules and Foreign Exchange Law. As a result, a grave situation has ensured, for it has had bad effects on the nation's diplomacy, trade policy, and economic activities, and on its objectives to sincerely keep word with friendly countries and to secure free trade through interna-

tional cooperation.

2. Meanwhile, the defendents testified as though the parts concerned in this cases were ordinary parts, of simple contents and technical skills. Moreover, they claimed that for this exports, they had no idea or kowledge of obtaining approval from the Minister of International Trade and Industry. In the examination, the evidence generally indicates that exporting the above parts and technical skills resulted under the following circumstances: Previously, 4 metal machine tools (worth about ¥4,125 million) were exported to the Soviet Union, in violation of COCOM rules and the Foreign Exchange Law. After Soviet engineers conducted an inspection of the tools, they made claims on them, and the company inevitably had to supply them with, the parts for the above machine tool and a modified software of techniques for its operation.

Although prosecution has not been instituted in this case, due to the fact that the statute of limitation has run out concerning the export of a metal machine tool, we cannot separate the above closely connected circumstances from the case. As stated before, the defendents confidentially produced and designed the Numerical Control device to be remodeled and installed into a fine-axis control machine later in the Soviet Union. During the exporting of machines, the company designed the machine into a lather for which there is no official restriction of export to the Soviet Union, by attaching a two-axis numerically controlled machine tool, and received the non-corresponding certification of the Minister of International Trade and Industry. Therefore, the fact that from the beginning they realized that the metal machine tools in this case, required by the Soviets, were in violation of the COCOM rules and the Foreign Exchange Law; and they knew that while exporting cutter heads, the parts for machine tool and the modified softwares, they were already remodeled with the NC device and in operation in the Soviet Union, with the cooperation of Kongsberg; and although the defendents (especially X) did not have knowledge or understanding on each law and article, as revealed in the testimony of their investigation; it is natural to consider that the defendents certainly realized that the export was in violation of the COCOM rules. Even from a more lenient perspective, the defendents, being the top managers of a company that manufactures machines and sells them to the Soviet Union, exporting goods in this case without examining the regulated items and referring to the Minister of International Trade and Industry, cannot avoid blame for their carelessness. It may be concluded that we cannot dismiss this case as a mere violation of procedures from ignorance of law on trifling exports of cargo and technical skills.

3. Thus, in considering this whole case, it is seen that the defending company drove ahead in its business, suppressing negative opinions with the consent and instructions of the executives. In order to cover up the illegal export attempt, it has taken advantage of the Ministry of International Trade and Industry (MITI) officials, who assume that truth

is written in all the application forms except in special cases, and of their trust in a big trading company when investigating export permits. After Kumagai, of Wako Koeki Co., disclosed this case to the COCOM, all those involved in the illegal sales agreed to destroy documents concerning the exports and conspired to submit a fake report to the MITI. Moreover, the defending company has delayed the government's taking proper measures against it. Consequently, suspicion grew in democratic nations such as the United States toward our country, and the illegal export discredited this nation in East-West trade relations. Therefore, the blame on the defending company is unavoidable.

4. Naturally, there is nothing to blame when a private corporation seeks profits from free, positive trade activities. These economic activities contributed to the development of our country. However, corporation activities ignoring the morale and the rules of international society must be controlled. The defendents testified that the COCOM rules and the Foreign Exchange Law are indistinct, and that interpretation and application of these rules are far more lenient in the European countries. If so, as a big company with voices they should have urged the government to clarify the Foreign Exchange Law and, with a dignified stance, demand the government to claim deregulation of COCOM rules in the diplomatic arena. A leading corporation should not be misled by immediate profit, rather it should choose the righteous way, acting properly even when making a detour.

5. On the other hand, in view of the motivation in the circumstance up to this case, we should take into consideration the following: At the defending company, exports to the Communist countries were anticipated for covering a business slack, and the Soviet officials proposed the exporting procedures for evading COCOM rules and the Foreign Exchange Law, while Norway's Kongsberg actively cooperated. The defending company had no intention of applying the metal machine tool for military usage, and there has been no proof that this transaction has interferred with international peace and security. Also, by this case, the defending company has been subjected to administrative measures on illegal exports to Communist countries, with a loss of business and social sanctions; furthermore, preventative measures against recurrence of a similar crime are being taken.

The defendents X and Y both took part in this case of crime, but there are sympathetic circumstances we should take note of. The defendents followed their superiors' instructions and had not personal aim for profits. X, having a negative opinion about the act, merely followed business instructions of his boss, participating in the technical area when the fundamental plans for the illegal export was established. Y, then the manager of exports to Communist countries, had become concerned about decreasing orders from the Soviet Union, problem he has to meet. For only the defendents who followed company instructions to be punished would be unfair, while other personnel

related to the case will merely leave the office. The defendents have already been subjected to a sanction of physical restraint and suspension from office.

Judges: Toshio Yonezawa (presiding)
Takashi Nagai
Kentaro Tani

Crashing of a U.S. Spotter Plane — Complaint by Injured Residents against the Two U.S. Pilots and the State (Japan) — Reparations for Injuries and Damages Done — Complaint against the State Accepted Based on Article 2 of the Special Civil Law Act

Yokohama District Court, Judgment, 4 March 1987, Case No. *wa*-20965 (1980). *The Hanreijiho* (Judicial Reports) No. 1225, pp. 45 et seq.

X1, X2, X3, X4 v. Y1, Y2, Y3

On 27 September 1977, a U.S. Marine Corps RF4B Phantom spotter plane, with chief pilot Y1, and pilot Y2 on board, soon after taking off from Atsugi Base in Kanagawa Prefecture, caught fire and crashed in a residential area of Yokohama (2310 Edacho, Midori-ku). Y1 and Y2 were able to escape just before the crash, using parachutes, but as a result of the crash several houses were entirely and partially destroyed by fire, three residents were killed and six were injured. X1, who suffered third-degree burns on most of her body from the crash, together with her husband X2 and her two children X3 and X4, filed a civil suit against Y1 and Y2 and the State (Y3) demanding reparation for damages to movable properties such as furniture and *ex gratia* payment, totaling ¥140,721,329. The plaintiff (X1, X2, X3, X4) claimed that Y1 and Y2 had acted in violation of their obligations to inspect the plane before takeoff (based on Article 709 of the Civil Law Act) and that Y3 was responsible for the following: (1) flaw in the establishment and management of Atsugi Base (based on Article 2, paragraph 1 of the State Tort Liability Act), (2) negligence of the airport control personnel at the time of takeoff (based on Aticle 1, paragraph 1 of the State Tort Liability Act), (3) negligence of the ground crew for jets who installed the support of the left engine, which was the cause of the Phantom plane crash (based on Article 1 of the Special Civil Law Act), (4) defects of the Phantom plane (based on Article 2 of the Special Civil Law Act), and (5) negligence of Y1, Y2, Y3 (based on Article 1 of the Special Civil Law Act). Against this claim, Y1 and Y2, members of the U.S. armed forces, maintained that the suit was legally inappropriate because they were not subject to the civil jurisdiction of the courts of Japan for accidents committed in the performance of their official duties. Further-

Exhibit 8

Consumer Protection Law and Policy in Japan

Mitsuo Matsushita※

Introduction

The importance of consumer protection began to be recognized in Japan around 1960 or little later. The Second World War devastated the economy almost completely and reconstruction had to begin out of ashes of the old regime. The period from 1945 to 1960 was that of rehabilitation and reconstruction of the economy and, in this period, not much resources could be devoted to the promotion of consumers welfare.

The rehabilitation and reconstruction of the Japanese economy neared completion around 1960 and the economy began to achieve a high growth. As time went by, there arose a recognition that the promotion of consumer interests and consumer rights were essential for the sustainable development of economy. After all, it is consumers whose demand ultimately determines the direction of economy. Governmental policies gradually started to shift from solely emphasizing industrial developments to taking into account of more diversified aspects including consumer protection issues. With regard to consumer protection policies in Japan, the year 1968 is epoch-making since this is the year in which the Consumers Basic Law was enacted which declared that consumer protection and promotion is one of the important national policies and the government is directed to take necessary measures to implement it. We now turn our attention to the Consumer Protection Basic Law.

1. Basic legal framework for consumer protection policy in Japan

(1) Basic principles

The legal framework for the protection of consumers is provided for in the Consumers Basic Law (Law 78, May 30, 1968).

This law is an expression of governmental policies in the form of law providing the government a legal framework within which the government is obligated to formulate concrete measures and implement them.

This law declares the objectives of consumer protection in Japan and states the

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basic principles which the government should observe in executing consumer protection policy. Therefore, any discussion regarding consumer protection in Japan should begin with discussions of this law.

This law is divided into four chapters and each chapter announces the principles relevant to the field to which the chapter is devoted.

Article 1 sets out general principles including the purposes and objectives of consumer protection policy. According to this provision, there is gap between enterprises and consumers in the quality and quantity of information and bargaining powers and, in order to correct this imbalance, both the central government and local governments are responsible to take measures for the maintenance of consumers rights and their independence in decision-making. It also declares that the objective of this law is to provide the principles on the basis of which the government agencies implement consumer protection policy.

(1) Consumer protection policy

Article 2 sets out general policies for consumer protection including: (a) consumer safety, (b) independence of consumers in their decision-making as to what commodities and services to choose, (c) providing of sufficient information on commodities and services and of consumer education, (d) reflection of consumers views in the governmental policies, (e) prompt remedies when consumers are injured and (f) assistance to consumers so that they can act to protect their own interests.

This article also states that, in formulating consumer protection policy, the legislators and administration should take into account the fact that high speed telecommunications are the basic features of society, internationalization necessitates international cooperation between governments and consumers groups and consumer protection policies should be promoted in harmony with environmental protection policy.

(2) Obligations of the central and local governments

Article 3 declares the obligations of the central and local government. It states that the central government is obligated to maintain and promote consumers rights and interests.

(3) Obligations of enterprises

Article 5 is concerned with the obligations of enterprises in relation to consumers which include the obligations (a) to maintain safety of consumers and fairness in transactions between enterprises and consumers, (b) to provide necessary information to consumers, (c) to take into account the knowledge, experiences and property of consumers when transacting with them, (c) to resolve promptly disputes between enterprises and consumers when they arise, and (d) to cooperate with consumer policies taken by the governments. Article 6 states that trade associations should establish the system of dispute settlement between consumers and enterprises and formulation of standards to be complied with by enterprises when they engage in activities while respecting the independent judgment of enterprises.

(4) Obligations of consumers

Articles 7 and 8 provides that consumers and consumer organizations are obligated to learn knowledge about products and services, engage in dissemination of information regarding products and services and in promoting consumer education.

(5) Consumer policy

Articles 9 and 10 state that the government is required to formulate policies for the promotion of consumers interests and, whenever necessary, enact laws and/or amend existing laws as well as provide necessary fund..

(6) The basic framework for consumer protection

Articles 11-23 are devoted to the laying out of basic categories in which the government needs to take measures and they include the following items.

[Safety] (Article 11)

The government is required to set up standards for product safety and to provide sufficient information about safety of products to the general public.

[Consumer contract] (Article 12)

The government is required to formulate and declare rules and regulations for

fair and equitable contracts between enterprises and consumers including a sufficient provision of information on the part of enterprises to consumers.

[Measurement] (Article 13)

The government needs to ensure that the system of measurement should not be misused by enterprise to the disadvantages to consumers

[Standardization] (Article 14)

The government should make sure that standards of products and services are properly formulated and maintained with the purport of protecting consumers' interests.

[Advertisement] (Article 15)

The government needs to enact laws and regulations regarding advertisement so that consumers would not be misled by false and misleading representation and make mistaken choices of commodities and services.

[Promotion of free and fair competition] (Article 16)

The government should enact laws and regulations for the promotion and maintenance of free and fair competition among enterprises so that consumers would benefit from it.

[Dissemination of information, consumer education and reflection of consumers views in the governmental decision- making] (Articles 17-18)

The government should take steps to ensure that these items will be properly taken care of.

[Dispute settlement] (Article 19)

The central and local government should establish the bodies to settle disputes between enterprises and consumers and the procedures for such dispute settlement.

(7) Administrative agencies and councils

Articles 24-28 provide for the relevant administrative bodies and councils which advise the government in carrying out the consumer protection policy in Japan.

2. Specific legislation in major areas

As stated above, the Consumers Basic Law provides the legal framework within which the government formulates consumer protection policies and come up with necessary legal and non-legal means to carry out such policies. The Law also designates several areas in which the government should enact specific laws and regulations. We will look at specific pieces of legislation which the government has enacted and maintains to carry out the mandates of the Consumers Basic Law. Such laws and regulations are many and cover wide areas of consumers protection. We need to be satisfied with mentioning only a few examples of such legislation.

(1) Product safety

Product safety is probably the most basic requirement for consumer protection policy. To accomplish this purpose many laws and regulations have been promulgated. Some examples are *inter alia*, the Food Safety Basic Law (Law 48, July 1, 2005), the Pharmaceutical Law (Law 145, August 10, 1960) and the Consumers Products Safety Law (Law 31, June 6). All of such laws have common features in that they establish detailed standards of product safety, the methods of testing safety of products, the marking of products which pass the safety test and penalties to enterprises when they violate those rules.

As a Member of the World Trade Organization (the WTO), Japan is obligated to observed WTO agreements. With regard to safety of food stuffs, the Agreement on Sanitary and Phytosanitary Measures provides certain standards and the Japanese standards are based on such international standards.

Likewise, with regard to product safety of industrial goods, the Agreement on Technical Barriers of Trade prescribes that Members need to base their mandatory standards on international standards. The Japanese standards are based on such international standards.

(2) Consumers contract

The basic law governing transactions between individuals in Japan is the Civil Code (Law 89, April 27, 1897) and transactions between enterprises and consumers are generally covered by the Civil Code. The Civil Code is based on the premise that every party in a transaction is equal. This, however, does not necessarily reflect the reality as far as transactions between enterprises and consumers are concerned. Often enterprises have more knowledge and resources than consumers and enterprises may impose contractual terms on consumers which are unreasonable and disadvantageous to consumers. For this reason, in order to ensure that there is fair and equitable contractual relationships between enterprises and consumers, many laws have been enacted modifying the general rules of the Civil Code. These laws impose some restrictions on enterprises in such a way that their abuse of economic powers is restrained and consumers' rights are protected. There are many of such pieces of legislation in Japan and, in the following passages, only a few examples are given to illustrate what such specific laws provide for the protection of consumers.

[The Consumers Contact Law (Law 78, May 30, 1968)]

This legislation recognizes that there is a gap between enterprises and consumers in terms of information, technical knowledge and economic and legal resources regarding commodities and services which consumers purchase. In order to prevent unfair treatment of consumers by enterprises which may arise due to this imbalance of bargaining powers, this legislation incorporates several principles which rule transactions between enterprises and consumers such as that (a) consumers can cancel their statement of intent to enter into contract with enterprises if the expression of such intent of consumers is made by mistake, (b) consumers can revoke a statement of intention to enter into contract if such statement is made due to harassment by an enterprise and (c) unreasonable contract terms incorporated into a contract between a consumer and an enterprise can be held as invalid.

[The Installment Sales Law (Law 159, July 1, 1961)]

This law obligates enterprises engaged in installment sales to consumers to disclose fully the contents of the conditions of the sale in question by handing over

documents in which such terms are described. This law also provides for "cooling off" by which a consumer who purchased a commodity in a site other than sales establishment of a seller-enterprise can cancel the purchase within 8 days.

[Excessive interest rates]

One of the serious social problems in Japan is excessive interest rates imposed by banks and other financial institutions over consumers when they borrow money. To protect consumers from abusive lending, there are many laws. Two examples are given.

The Law to Regulate Money Lenders (Law 32, May 13, 1983) provides for the registration of money lenders according to which money lenders need to be registered with the government. According to this law, money lenders must hand over documents to borrowers in which the terms of lending are clearly spelled out. It also prohibits money lenders from engaging in excessive lending beyond the ability of the borrower to pay back and from engaging in advertisement which may mislead borrowers that the lending is advantageous to borrowers.

The Law to Restrain Unreasonable Interest Rate (Law 100, May 15, 1954) is a law to modify the Civil Code which provides that the interest rate on lending money cannot exceed certain limits, e.g., 15% for lending 1 million yen or above, 18% for lending 100000 yen to 1 million yet and 20 for lending less than 100000 yen. Any payment above this stipulated rates is regarded as null and void. If a borrower pays interest beyond the stipulated rates, this payment can be regarded as a payment of part of the principal.

(3) Product liability

Generally a seller is responsible to a purchaser when the product bought by the purchaser is defective. This is called warranty. Also the producer of a product is responsible to the purchaser of this product if the product is defective and damage is caused to the purchaser. From the consumer protection standpoint, product liability issue is especially important. Generally product liability is recognized as a type of tort liability in the Civil Code and the malefactor must indemnify the damage incurred by the victim. However, according to the general principles of the Civil Code, the burden of proof of malicious intent or negligence on the part of the malefactor falls upon the victim. Often such a burden of proof is too heavy on the victim when he/she is a

consumer due to the lack of resources and knowledge.

In order to remedy this situation, the Product Liability Law (Law 85, July 1, 1994) is enacted which supply additional rules regarding the liability on the part of enterprises. According to this law, the producer of a product is liable to compensate the damage caused by "the lack of safety of the product" which is regarded as the safety that the product in question should generally have regardless of whether or not the lack of safety is the result of malicious intent or negligence on the part of the producer. In this way, this law eases the burden of proof of purchaser by eliminating the responsibility on the part of the purchaser to prove malicious intent or negligence on the part of the producer. Although the purchaser must prove the fact that the product in question lacks the safety that it should have and, in this respect, a purchaser who is a consumer still may have difficulty in meeting this requirement, this legislation lightens the burden of proof of consumers when bringing actions against enterprises on account of product defects.

(4) Measurement

Measurement of weight, length, quantity and size of things are the basic requirement for any fair transactions. For this purpose, the Measurement Law (Law 50, May 2, 1992) establishes and enforces the basic standards for measuring weight, length, quantity, size and other related matters (such as metric system). Generally this law conforms to the standards set up by international standards if there are any.

(5) Representation and advertisement of products and services

Representation and advertisement of products and services are essentially important for consumers to be informed of the quality, quantity and contents of products and services which they purchase. It is also essential to enterprises for the purpose of informing potential purchasers of the contents of what they offer. In order to secure accurate and fair representation and advertisement, many specific laws are enforced in Japan. As indicated below, there are laws which regulate the establishment and enforcement of standards and all of such laws contain provisions requiring enterprises to disclose accurate information to consumers. In the following paragraphs, three laws which are primarily devoted to the control of representation are briefly explained.

[The Law to Control Excessive Premium and Unreasonable Representation Law (Law 134, May 15, 1962)]

The Premium and Representation Law is a supplementary legislation to amplify the contents of the Antimonopoly Law (which will be explained later) and specifically designed to control excessive offerings of premium and unreasonable representation. There are two aspects in this law, e.g., offering of premium when a seller sells commodities and representation and advertisement of commodities and services. Especially relevant to consumer protection issues is the regulation of representation and advertisement of commodities and services. Under this law, unreasonable representation including advertisement is prohibited. Unreasonable representation in this law includes false representation and misleading advertisement. Interpretation of misleading representation and advertisement is left to the Fair Trade Commission (the FTC) and courts.

When a violation occurs under this law, the FTC issues an order to the party in violation telling it to cease and desist from using the representation or advertisement.

Another important aspect of this law is the fair competition code which is entered into among enterprises for the purpose of eliminating false and misleading advertisement. When a group of enterprises draft a rule regarding representation of the products or services they offer to consumers, they are required to submit it to the FTC and, when the FTC approves it, this rule can be enforced. Although this is a rule to be enforced by private enterprises, it can serve a useful purpose of eliminating unreasonable representation.

[Intellectual properties]

Although the primary purpose of intellectual property laws is to protect the rights of owners of intellectual properties, some aspects of intellectual property laws are relevant to the protection of consumers. For example, the Trademark Law (Law 127, April 13, 1959) is to protect trademarks as an intellectual property and, at the same time, it has the effect of protecting consumers. Trademarks which would constitute violations of the public order and good morals are prohibited. This keeps consumers from being exposed to inappropriate expressions. Another important function of the Trademark Law is to prohibit counterfeit goods. This has the effect of protecting

consumers from unknowingly purchasing counterfeit products.

The Unfair Competition Prevention Law (Law 47, May 19, 1993) is also relevant to consumer protection issues. The purpose of this law is to prevent unfair competition such as using a trade name which is easily mistaken to be that of a famous trade name such as IBM or Microsoft. Again this law protects the interest of enterprises by protecting trade names and reputation which goes with them. However, it has an effect of protecting consumers from being misled into believing that the enterprise with which consumers are dealing is a well-known and prestigious enterprise even though this is not true.

(6) Free and fair competition

The promotion and maintenance of free and fair competition among enterprises generally benefit consumers by reducing consumer prices, offering diverse opportunities to consumers to purchase and promoting technological and other innovations. The law to promote and maintain free and fair competition is the Antimonopoly Law (the AML, Law 54, April 14, 1947). The AML generally benefits consumers by maintaining competition among enterprises. However, some aspects of the AML are especially relevant to consumer protection issues and we now turn to them.

The AML prohibits cartels including price-fixing cartels. Price fixing cartels raise consumer prices and cause monetary damage to consumers. Cartels are held as unlawful in principle and, although there are a handful of areas in which cartels as exempted from the AML such as insurance and transportation, cartels are held illegal unless exempted by statutes.

Another important aspect of the AML directly relevant to consumer protection issues is the prohibition of resale price maintenance. (RPM) RPM is a practice wherein a manufacturer imposes on distributors and retailers of the product that it supplies the condition that they abide by the price (usually the minimum price) indicated by the manufacturer. RPM has the effect of pegging retail prices of commodities at the level indicated by manufacturers and of preventing them from coming down by the pressure of competition among retailers. RPM is generally prohibited by the AML although books, magazines and other objects covered by copyrights are exempted from the prohibition.

3. Dispute settlement and bargaining

Remedies available to consumers are diverse. Consumers can bring lawsuits against enterprises by laws when they suffer damage to their property. They can petition to governmental ministries and request that the ministries take certain measures to remedy wrongs. Consumers can take collective actions such as boycott of the products of enterprises that are harmful to them or that are produced by enterprises in violation of laws. Also consumers can form cooperatives and engage in collective purchasing and thereby reduce the cost of gaining products. In the following passages, selected issues of remedies and bargaining will be touched upon.

The Civil Code and the Civil Procedure Code (Law 109, June 26, 1996) provide for procedures whereby consumers can challenge wrongful practices of enterprises. As stated earlier, the premise of the Civil Code and the Civil Procedure Code is that parties in a lawsuit are equal in abilities and resources. In reality, however, often this is far from reality. In reality, consumers are poorly equipped with legal knowledge and lack sufficient economic resources to carry out successful lawsuits against enterprises in courts.

In light of the above situation, courts have endeavored to formulate rules favorable to consumers. For example, in cases in which consumers are the plaintiffs against powerful enterprises in product liability suits, the burden of proof of plaintiffs is lightened to the effect that they need only prove that there is a defect in the product in question and the damage could not have happened but for this defect.

In Japan, however, class actions is not recognized in which a party injured by a wrongful act of another party brings a suit against the other party representing all persons who have incurred damage due to that wrong. In order for a person to represent persons who suffered damage by the same cause, he/she must be commissioned by those persons. Practically it is very difficult to get such commission when there are a large number of victims and the amount of damage which each victim suffers is not great. There have been discussions among government officials, lawyers and academics regarding whether there should be a class action system in Japan. However, this has not been materialized yet.

However, a partial resolution of the problem has been attempted. In 2006, the Consumers Contract Law was amended to make it possible for consumer organizations to bring injunctive suits against enterprises in the areas covered by the Consumer Contract Law. Therefore, when contracts contain terms that unilaterally impose disadvantage to consumers, consumer organization can bring a suit against the enterprise and request courts to declare such contractual terms null and void. This amendment took effect as of 7 June 2007. The scope of this law is rather limited in the

sense that it grants the right to bring an injunctive suit only in the areas covered by the law.

In connection with the proposed amendment of the AML which will take place in 2008. a proposal is made that the Law to Control Unreasonable Premium and Representation should be amended so that consumer organizations can bring an injunctive suit against enterprises which engage in unreasonable representation including false and misleading advertisement.

In the above examples, no attempt is made to include the right of consumer organizations to bring a damage suit against enterprises whose methods of sale cause damage to consumers. In this respect, the above movements for strengthening consumers right is a modest advancement. Nevertheless, it is a good start and it is expected that, in future, there will be more proposals to advance consumers rights.

Governmental ministries in charge of supervising industries producing and supplying consumer products have offices where consumers can bring petitions claiming that they suffered property loss by wrongful conducts of enterprises and requesting that the agency take necessary measures to remedy the wrongs. Although it belongs to the discretion of ministries to decide whether to take actions or not, such offices accomplish useful purposes for protecting the interest of consumers. Local governments have similar offices in which consumers complaints are received and steps are taken to remedy the situation.

For example, Article 45.1 of the AML authorizes anyone who believes that there is a violation of the AML or supplementary laws of the AML can request the FTC to investigate. The FTC is required to make a preliminary investigation and inform the person who informed the measure it took and, if no legal measure is taken, the fact that no measure was taken.

Especially noteworthy is the Center for People's Life established by the Consumers Basic Law. This is a public body separate from the ministries and acts as an independent agency. Its activities cover wide areas such as consumer policy advocacy, dissemination of information on products, engaging in consumer education, testing products for the purpose of detecting defects, alerting consumers of risks that accompany the use of such defective products and receiving and processing complaints by consumers.

Lastly the Consumers Cooperative Law should be mentioned. This law authorizes consumers to organize themselves in cooperatives. Such cooperatives are granted tax exemptions and can engage in collecting buying. This enables cooperatives to engage in buying products and services from manufacturers and farmers on behalf of their

members and thereby accomplish the advantage of scale merit. This in turn reduces the cost of purchase of goods and services. Also consumer cooperatives can act as countervailing powers *vis-a-vis* large enterprises selling products and services to consumers and prevent them from abusing their market powers.

There are thousands of such cooperative in Japan. Some of them are directly in touch with producers of goods and farmers who produce industrial goods and farm products. In this way, consumers can not only reduce cost of purchase but also request, for example, to farmers to produce agricultural products without using certain chemicals and additives which may be hazardous.

Conclusion

The Japanese economy is a developed economy. As discussed in this paper, there are many laws designed to promote and protect interests of consumers. With regard to consumer laws, Japan is equal to other developed economies. However, vigorous enforcement of such laws must be supported by active consumers movements and activities. Japan has somewhat lagged behind other developed economies such as those in the United States and Europe in the promotion of consumerism in this respect. A future task of both the government and consumers in Japan is to promote the awareness of consumers of their rights and obligations as responsible citizens of the society.

Exhibit 9

MAJOR WTO DISPUTE CASES CONCERNING GOVERNMENT PROCUREMENT

Mitsuo Matsushita[*]

ABSTRACT

The Government Procurement Agreement ("GPA"), the successor of the Tokyo Round Government Procurement Code, is one of the Plurilateral Agreements (Annex 4) in the WTO. The contents of the GPA have been incorporated into domestic procurement legislation in the participating Members including the United States, the European Communities and Japan. There are relatively few GATT/WTO cases that arose under this Agreement. However, there are two outstanding cases, e.g., the Trodheim Case and the Korean Inchon Airport Case. In the former, the Panel held that the single tendering of the contract by the Norwegian Public Roads Administration did not meet the requirements of Article V:16(e) of the Tokyo Round Procurement Code. In the latter, the United States took Korea to the WTO dispute settlement procedure and argued that the Korea failed to comply with the requirements of the GPA by imposing bid deadlines and domestic partnerships and by awarding the contract to the Korea Airport Authority. The Panel found that the Korean Airport Authority was not included in the concession of Korea for the entities subject to the GPA and therefore was outside the scope of the GPA.

In the United States, state Buy America and Buy State laws preclude public procurement entities of States from procurement of foreign goods. In the State of Massachusetts Case, the State of

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Massachusetts enacted a law prohibiting state entities from procurement of goods from countries engaged in trade with Burma. The European Communities and Japan petitioned to the WTO. While the Panel process was going, a United States trade association brought a suit in U.S. federal courts against the States of Massachusetts for the reason that this state law infringed the Constitution of the United States. The Supreme Court of the United States decided that it infringed the authority of the President of the United States and struck down the law. The WTO Panel was disbanded.

The GPA provides that Members establish challenge procedures in their domestic jurisdictions in which foreign enterprises can bring a complaint against the procurement entity on the ground that its procurement practice in inconsistent with provisions of the GPA. In Japan, Motorola, a U.S. company, brought a complaint in the Japanese challenge procedure (CHANS) against the Japan Railway (the JR) for the reason, inter alia, that the JR did not base its standards on an ISO standard whose enactment was imminent. CHANS decided that the GPA required only that international standards that existed need to be based on but not those whose enactment was imminent and rejected the claim of Motorola.

KEYWORDS: *Government Procurement; The Agreement on Government Procurement; public procurement; open tendering; selective tendering; individually negotiated contract; Buy American Laws; domestic challenge system regarding public procurement; the Trohdhaim Case; the Massachusetts Myanmar Case; the Japan Railway/Motorola Case*

I. OUTLINE OF THE GOVERNMENT PROCUREMENT AGREEMENT

The Government Procurement Agreement ("the GPA"), one of the Plurilateral Agreement (Annex 4 of the Marrakesh Agreement), deals with procurement by public entities of WTO Members of this agreement.[1]

[1] For details of government procurement issues, *see generally* LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT (Bernard M. Hoekman & Petros C. Mavroidis eds., The University of Michigan Press 1997). For a recent literature, *see* Peter

Therefore, it is binding only on those Members of the WTO which opted to join but no others. At this time, there are 23 Members of the GPA.

The predecessor of the GPA was the Tokyo Round Government Procurement Agreement (1979) which provided for the national treatment and non-discrimination principles in government procurement as well as transparency in laws and regulations related to government procurement. Also special treatment for developing countries was provided. The application of the Tokyo Round Agreement was generally limited to procurement by central government agencies as well as local government and entities related to government. Construction, designing and consulting were excluded from the application.

The GPA came into being on 15 December 1993 as part of the WTO regime. The GPA consists of 23 Articles and Appendixes. The GPA succeeded some principles of the Tokyo Round Agreement such as the national treatment and non-discrimination. However, it added several new features, e.g., *inter alia*, (a) the coverage extends to services, (b) it is stated that local governments are subject to disciplines and (c) Parties are obligated to set up challenge procedures to implement the GPA domestically.

National treatment and non-discrimination is one of the most important principles of the GPA. Article III:1 of the GPA provides that each Party shall provide immediately and unconditionally to products, services and supplies of other Parties treatment no less favorable than that accorded to domestic products and services and those of any other Party. Also Article III:2 provides that each Party shall ensure that its entities shall not treat a locally-established supplier less favorably than another locally-established supplier on the basis of degree of foreign affiliation or ownership and that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the GPA.

Article VI:1 of the GPA provides that the technical specification shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. Article VI:4 requires that entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

With regard to tendering procedures, Article VII provides for three kinds of tendering, e.g., (a) open tending in which all interested suppliers may submit a tender, (b) selective tendering in which only invited supplies

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Trepte, *The Agreement on Government Procurement*, *in* 1 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1124-63 (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., International Law Institute 2005).

may submit a tender and (c) limited tendering where the procurement entity contracts with suppliers individually. Although not stated explicitly, open tendering and selective tendering are the principle and limited tendering an exception.

It is noteworthy that Article XX of the GPA provides for challenge procedures, i.e. the procedures in which Parties are obligated to establish a dispute settlement body within its jurisdiction where an enterprise which deems that its interests have been adversely affected by an infringement on the part of the procurement agency of provision of the GPA can bring a complaint and seek remedies.

II. DOMESTIC IMPLEMENTATION OF THE GOVERNMENT PROCUREMENT AGREEMENT

Article XXIV of the GPA states that (a) each government which is a Party to the Agreement shall ensure the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities subject to the control of the GPA with the provisions of the GPA and (b) each Party shall inform the Committee on the Government Procurement of any changes in its laws and regulations relevant to the GPA in the administration of such laws and regulations. In accordance with this provision, Parties to the GPA reported to the Committee how provisions of the Agreement are implemented. Domestic implementation of the three jurisdictions is explained as examples, i.e. the European Communities, the United States and Japan.

A. The European Communities[2]

The basic provisions in the EC Treaty on government procurement are Articles 6-36 which provide for non-discrimination on the grounds of nationality and the ban on quantitative restrictions on imports and all measures having equivalent effects. Also Article 52 & *seq.* provide the right to establishment in the territory of another Member State and Article 59 & *seq.* the freedom to provide services. There is a group of Directives which lay down rules of government procurement.

The GPA was incorporated into EC law by Council Decisions N. 94/800/EC of 22 December 1994 which require that EC Member States embody its content into their national laws and regulations. Therefore, with respect to the procurement above the threshold value, EC law and domestic

[2] Committee on Government Procurement, *Notification of National Implementing Legislation*, Communication from the European Community, GPA/20 (Jan. 28, 1998); Committee on Government Procurement, *Review of National Implementing Legislation*, European Community, GPA/32 (Jan. 12, 2000).

laws of the Member States reflect principles of the GPA. However, for contracts below the thresholds, national rules are not bound by EC Directives. Although each state has its own public procurement rules, these must comply with the general principles of the EC Treaty providing for non-discrimination in respect of goods and services.

The Directives issued for implementing the Agreement fall into two categories, e.g., (a) those governing the traditional areas of public procurement (public directives or traditional sectors directives) and (b) those dealing with utilities such as water, energy, transport and telecommunications. Each group is completed by a Remedies directive. The principles of those directives include a ban on discrimination, open access to all EC suppliers, transparency of award procedures, a precise indication of which of the permissible award procedures has been chosen, compliance with technical requirements and transparency of the procedures for selecting contractors and awarding contracts. The EC Report to the Committee explains the details of how each Member State has implemented those directives.

B. The United States[3]

In the United States, the major laws and regulations implementing the GPA are (a) The Uruguay Round Agreements Act, (b) The Trade Agreements Act of 1979, (c) Federal Acquisition Regulation, (d) Armed services Procurement Act, (e) Federal Property and Administrative Services Act and (f) The Office of Federal Procurement Policy Act.

The Uruguay Round Agreements Act[4] approves WTO agreements which are the result of the Uruguay Round and provides for implementation and entry into force of those agreements. This Act amends the Trade Agreements Act of 1979 and authorizes the President of the United States to implement the content of the Agreement. The Federal Acquisition Regulation (the FAR) establishes policies and procedures for acquisition by all United States agencies

In accordance with the Uruguay Round Agreements Act, the GPA took effect in the United States on 1 January 1996. All federal government entities in a narrow sense of the words and those listed in Annex 3 are subject to the Trade Agreements Act of 1979 and therefore to the GPA. Such entities include the St. Lawrence Seaway Development Corporation,

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[3] Committee on Government Procurement, *Notification of National Implementing Legislation*, Communication from the United States, GPA/23 (July 15, 1998); Committee on Government Procurement, *Review of National Implementing Legislation*, United States, GPA/50 (June 15, 2001).

[4] For details of this Act, *see* Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, 103d Congress, 2d Session, House Document 103-316, Vols. I & II (1994).

the Tennessee Valley Authority and the Bonneville Power Administration. Although federal laws and regulations do not govern procurement by state governments, state governments must comply with certain federal requirements when these receive grant from the federal government and carry out projects by such grants.

The Trade Agreements Act of 1979, as amended by the Uruguay Round Agreements Act, authorizes the President of the United States to waive the application of any discriminatory measures and the President ordered federal agencies that are covered by the GPA to comply with obligations to the GPA. Although the Federal Buy American Act of 1933[5] requires federal agencies to purchase U.S. products and make contracts with construction agencies which use U.S. products in principle, the restrictions of the Buy American Act do not apply to procurements that are subject to the agreement. To that extent, therefore, the Federal Buy American Act has been superceded by the GPA. This waiver does not cover Buy American and Buy State laws and regulations of states.

C. Japan[6]

In Japan, the basic law governing government procurement is the Account Law.[7] Under this law, a number of cabinet orders are issued which include, *inter alia*, the Cabinet Order Concerning the Budget, Auditing and Accounting, the Special Order Concerning the Budget, Auditing and Accounting and the Regulations on the Management of Contract Administration.

With respect to local government, the Local Autonomy Law,[8] the ordinance for Enforcement of the Local Autonomy Law and the Cabinet Order Stipulating Special Procedures for Government are the major laws and regulations. There is no provision in the above laws and regulations which incorporate "Buy Japan Policy" and discriminatory measures and, therefore, these laws and regulations are generally in conformity with provisions of the GPA.

In Japan, one of the big issues in government procurement has been that of bid-rigging. In many cases, bid-rigging practices are based on a

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[5] Buy American Act of 1933, 41 U.S.C. § 10(a)-10(d) (1996).

[6] Committee on Government Procurement, *Notification of National Legislation of Japan*, Communication from Japan, GPA/37 (June 20, 2000); Committee on Government Procurement, *Notification of National Legislation of Japan*, Communication from Japan, GPA/67 (Apr. 15, 2002); Jean Heilman Grier, *U.S. – Japan Government Procurement Agreements*, 14 WIS. INT'L L.J. 1, 1-68 (1995). The last one discusses some features of Japanese procurement practices. Although this article appeared before the inauguration of the WTO, some features described there still remain true.

[7] Law No. 35 (Mar. 31, 1947).

[8] Law No. 67 (1947).

close relationship between the procurement agencies and bidders. In selective bid, the procurement agencies can exercise powerful control over potential bidders and this situation may create "in groups" out of which bidders are selected. These practices affect adversely openness of the procurement market in Japan. However, this is more a problem of competition policy and law than the GPA.[9]

III. MAJOR DISPUTE CASES AT THE GATT/WTO DISPUTE SETTLEMENT SYSTEM

Government procurement is a large market in terms of volume and value of transactions and there are many disputes with regard to openness of procurement market. However, there is a relatively small number of dispute cases that were raised at the WTO dispute settlement procedures and dispute settlement bodies established by the Parties. The smallness of the number of dispute cases that are reported may be due to the fact that the GPA is one of the Plurilateral Agreements in which whether to join it or not is optional and the number of Parties is relatively small. It may be that dispute cases handled by national courts and other dispute settlement bodies are not widely publicized and not known.

In any event, there are two kinds of dispute cases with regard to the Agreement, e.g., those raised before the WTO Dispute Settlement Body and those handled by challenge procedures in national jurisdictions of Parties established in accordance with Article XX of the Agreement.

So far there are two adopted GATT/WTO Panel reports which interpreted and applied the government procurement agreement. One is *the Trohdheim Case* in which the GATT Panel interpreted and applied provisions of the Tokyo Round Government Procurement Agreement and another one is *the Korean Inchon Airport Case* in which the WTO Panel interpreted and applied provisions of the GPA.

A. The Trondheim Case[10]

This case involved the award of a contract related to electronic toll collection equipment for a toll system around the city of Trondheim to a Norwegian company, Micro Design, by the Norwegian Public Roads Administration. The award was made by way of single tendering. The

[9] On this issue, *see generally* H. IYORI & A. UESUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN 86-92 (NY: Federal Legal Publications 1994). The information contained in this volume is somewhat outdated. However, its description of the nature of problems is still valid today.

[10] GATT Panel Report, *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, GPR.DS2/R (May 13, 1992) [hereinafter *The Trondheim Report*]. For a comment on this case, *see generally* Petros Mavroidis, *Government Procurement Agreement – The Trondheim Case: the Remedies Issue*, 48 SWISS REV. INT'L ECON. REL. 77 (1933).

United States took Norway to the GATT dispute settlement procedures and argued that Norway did not meet the requirement of Article V:15(e) of the Tokyo Round Agreement.[11] Article V:15 of the Tokyo Round Agreement provided that a procurement entity could use single tendering instead of open or selective tendering if there were certain conditions and, as one of such conditions, Article V:15(e) stated that a procurement entity could use single tendering "when an entity purchases prototypes or a first product which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development." The United States argued also that, in conducting the procurement, Norway had failed to respect its obligations under Article II:1 to accord to the products and suppliers of other Parties treatment no less favorable than that accorded to domestic products and suppliers.

The Panel noted, as a general proposition, that Article V:15 is an exceptions provision and needed to be interpreted narrowly and it was incumbent on the respondent, Norway, to prove that its invocation was justified.[12] The Panel stated that the question before it was whether the Norwegian Public Roads Administration had procured prototypes which had been developed at its request in the course of, and for, a particular contract for research or original development. According to the Panel, the crucial question was what the procuring entity was procuring (i.e. the output that it was procuring) and not the nature of the work that would have to be undertaken by the supplier to supply the goods and/or services being procured. The Panel held that the phrase "contract for research . . . or original development" had to be understood as referring to a contract for the purpose of the procurement by the procuring entity of the results of research and/or original development, i.e. knowledge.[13]

The Panel continued to state that, in order to be covered by Article V: 15(e), Norway would have had to have demonstrated that (1) the Norwegian Public Roads Administration had had as its principal purpose in concluding the contract the procurement of the results of research and/or original development from Micro Design and (2) that the principal purpose of the equipment procured from Micro Design under the contract had been to rest and provide a means of further developing the knowledge generated through that research and/or original development. In the view of the Panel, Norway did not fulfill the burden of proof on this issue. All of the evidence provided by Norway only indicated that the principal purpose of the contract of the Norwegian Public Roads Administration with Micro Design

[11] In this Report, the Panel refers to Article V:16(e). However, Article V:16(e) seems to be irrelevant to the issue here. It must have been Article V:15(e). Therefore, in this chapter, Article V:15(e) is referred to.

[12] *The Trondheim Report, supra* note 10, ¶ 4.5.

[13] *Id.* ¶ 4.8.

had been the procurement of operational toll collection equipment for a functioning toll rig system.

The Panel further noted that Norway had not claimed that the Public Roads Administration had plans to procure further toll ring systems on the basis of the model developed at Trondheim and found that Norway had not shown that the principal purpose of the Norwegian Public Roads Administration had been the procurement of the results of research and/or development rather than operational toll collection equipment as part of a functioning toll rig system.[14]

For the above reasons, the Panel found that the single tendering of the contract by the Norwegian Public Roads Administration did not meet the requirements of Article V:16(e).

Then the Panel addressed the issue of recommendation that was raised by the United States. The United States argued that the Panel make a recommendation to the effect that Norway bring its procurement into conformity with the Tokyo Round Agreement and also that Norway negotiate with the United States a mutually satisfactory solution taking into account the lost opportunities for U.S. companies. However, the Panel declined from making such a recommendation for the reason that it was not the past practice of Panels to recommend anything more than a request of conformity with the agreement in question and that and there was no provision in the Tokyo Round Agreement to clarify that it was within the power of Panels.

B. The Korean Inchon Airport Case[15]

This is a case concerning the construction of Inchon International Airport in South Korea. Originally the Ministry of Transportation and the New Airport Development Group which was under the jurisdiction of the Ministry were responsible for the construction. By the Seoul Airport Act, the authority to construct the airport was given to the Korean Airport Authority and subsequently to the Inchon International Airport Corporation. The United States petitioned to the WTO Dispute Settlement Body on the ground that all of those entities were covered by the Agreement and it was wrong for the Korean government to impose requirements on bid deadlines, qualification and domestic partnership. It also alleged that Korea failed to establish a proper dispute settlement body in accordance with the Agreement.

The Panel focused on the issue of whether the Korean Airport Authority was included in the entities in Korea's GPA Appendix. Korea

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[14] *Id.* ¶¶ 4.10-4.11.

[15] Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R (June 19, 2000) [hereinafter *The Korean Report*].

argued that it was not covered by the GPA. The Panel stated first that the Schedules in the GPA constituted part of the Agreement and were subject to the rules of interpretation as incorporated in Articles 31 and 32 of the Vienna Convention.

The Panel noted that Note 1 to Annex 1 of the Korean concession stated that the central government entities included their subordinate linear organizations, special local administrative organs and attached organs as prescribed in the Government Organization Act of the Republic of Korea. After examining the wording of Note 1, the Panel concluded that the Korean Airport Authority could not be included in the concession of Korea and that it was not legally unified with the government and was established by law as an independent entity. It also enacted its own by-laws, had its own management and employees who were not government employees. The Panel cited pieces of evidence such as above and concluded that the Inchon International Airport Project was not covered by the Agreement.[16]

The United States also raised a non-violation complaint alleging that its interest was nullified and impaired. The Panel pointed out that this case was different from traditional non-violation cases in that Korea had made no concession as far as the Korean Airport Authority was concerned and the United States could not have suffered nullification and impairment of a concession that had been given. However, the Panel pointed out that a non-violation was related to *pacta sunt servanda* and this applied to negotiation for concession as well as concession that had been already given. The Panel also stated that a non-violation could be related to an infringement of reasonable expectation with regard to trade negotiations. On this premise, the Panel examined whether there was a nullification and impairment suffered by the United States.[17] The Panel held that the Seoul Airport Act which authorized the Korean Airport Authority to prosecute the project was enacted in December 1991 and the United States bore the burden of proving that it had not known the legislation or the meaning of it at the time of trade negotiation. Korea claimed that the United States knew this legislation at the time of negotiation and other WTO Members took derogations on airport matters in their Schedules because of the Korea's legislation. For this reason, the Panel held that the United States did not clear the burden of proof and rejected the claim of the United States for nullification and impairment.[18]

In disposing of the non-violation issue in this case, the Panel stated that nullification and impairment could refer not only to that of benefit that had been conferred by a concession but also to expectation in negotiation of trade agreement. This aspect has not been given much attention in earlier

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[16] *Id.* ¶ 7.36.
[17] *Id.* ¶ 7.99.
[18] *Id.* ¶ 7.116.

panel and Appellate Body reports.

IV. DISPUTE CASES AT THE NATIONAL JURISDICTION

A. United States

In the United States, there are federal buy American laws and state laws which provide for buy American and buy state. As mentioned earlier, the Federal Buy American Act of 1930 has been basically replaced by the GPA and whatever remains in the Act are in conformity with the GPA. Problems lie in buy national laws enforced by States in the Union. States Buy American laws are quite complex in the sense that such laws stipulate that the state governments purchase U.S. made products and sometime that the states governments purchase products made in the state concerned. Also such Buy American and Buy State laws take the form of state statutes and sometime regulations of counties or townships. Because of this complexity, it is hard to grasp the total picture of Buy American laws exercised by various states.

However, some jurisprudential rules have been formulated through court decisions in the United States which deal with public procurement. On the one hand, there are a set of decisions holding that Buy American or Buy State laws were contrary to the Constitution of the United States because, under the Constitution of the United States, the regulation of foreign commerce belongs exclusively to the federal government and state laws and regulations usurp this exclusive power of the federal government by excluding purchase of foreign made products from the procurement of the state government concerned.[19]

On the other hand, there are a handful of court decisions which enunciate "the market participant doctrine" according to which state governments act as mere purchasing entities just like private enterprises when procuring products which they need. It argues that state procurement entities are entitled to select suppliers and sources of products which they desire to purchase. In this doctrine, there is no infringement of the constitutional limitation imposed on states that they should not encroach upon the realm of the federal government in regulating the commerce with foreign nations even if state governments exclude foreign products from their public purchase.[20]

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[19] Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Bethlehem Steel Corp. v. Bd. of Comm'n, 276 Cal. App. 2d 221, 80 Cal. Rptr. 809 (1969).

[20] Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stokes, *in* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXTS ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMICS 187-89 (West Group 1986).

Another issue is the effect of GATT/WTO disciplines on the conducts of state governments in public procurement. Although the Marrakesh Agreement is not a treaty in the sense of the United Statès Constitution, there are cases in which courts pronounced the state buy national laws were superseded by GATT.[21]

As mentioned above, legal issues regarding the status of state buy national laws in light of the United States Constitution and in relation to GATT/WTO are not entirely settled.

B. The State of Massachusetts Case

This case grew out of a legislation in the State of Massachusetts in the United States entitled as "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myammar)."[22] This law prohibited state entities from purchasing goods and services from any persons who are doing business in or with Burma. The purpose of this law was to impose economic sanctions on Burma for infringement of human rights and political oppressions. In 1998, the EC and Japan brought a petition to the WTO Dispute Settlement Body against the United States on the ground that this law infringed certain provisions of the GPA and a Panel was established.[23] However, the National Foreign Trade Council, a trade association in the United States, brought a suit against the State of Massachusetts in U.S. courts. The case was argued and decided by U.S. District Court[24] and Court of Appeals[25] and then petitioned to the Supreme Court of the United States.[26] The EC and Japan took into consideration the fact that a domestic proceeding was pending in the United States with regard to this legislation and suspended the Panel proceeding.[27] The Panel was disbanded when 12 month period passed after the suspension.

The Supreme Court of the United States held that the law in question was contrary to the Constitution of the United States. A brief summary of this decision follows.

The Massachusetts Law in question here was passed by the Congress of the State of Massachusetts in 1996 and subsequently the U.S. Congress

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[21] Baldwin-Lima Hamilton Corp. v. Superior Court, 25 Cal. Rptr. 799 (1962); Territory of Hawaii v. Ho, 41 Hawaii 565 (1957). *See*, however, K.S.B. Technical Sales Corp. v. North Jersey Water Supply Comm'n, 75 N.J. 272, 381 A. 2d 774 (1977).

[22] 1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Law, ¶ 7:22 GM, 40 1/2 (1997).

[23] WTO Doc., *United States – Measure Affecting Government Procurement–Constitution of the Panel Established at the Request of the European Communities and Japan–Communication from the DSB Chairman*, WT/DS88/4 (Jan. 11, 1999); WT/DS95/4 (Jan. 11, 1999).

[24] Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d (D. Mass. 1998).

[25] Nat'l Trade Council v. Natsios, 181 F. 3d 38 (C.A. 1 1999).

[26] Crosby v. Nat'l Foreign Trade Council, 520 U.S. 372 (2000).

[27] WTO Doc., *United States – Measures Affecting Government Procurement–Communication from the Chairman of the Panel*, WT/DS88/5 (Feb. 12, 1999); WT/DS95/5 (Feb. 12, 1999).

imposed sanctions on Burma which were limited to certain areas. The Foreign Trade Council, a private association, brought a suit in U.S. courts and sought for an injunction restraining state officials from enforcing this law for the reason of unconstitutionality. The Council argued that the law infringed the power to conduct foreign affairs conferred on the Federal Government. Both the District Court and the Court of Appeals upheld the injunction. The State of Massachusetts appealed to the Supreme Court of the United States.

The Supreme Court pointed out that the U.S. Congress authorized the President of the United States to impose sanctions and withdraw them when situation improves, i.e. the Congress conferred on the President discretion and flexibility in imposing and withdrawing such sanctions. However, the Massachusetts Law in question imposed immediate and perpetual sanctions and there was no termination clause. In this way, the State Law erected an obstacle to smooth operation of this Presidential power. State law must yield to a federal power if the U.S. Congress intends to occupy the area.

The State Law prohibited some contracts even when the federal laws permitted them and, although federal prohibitions applied only to U.S. citizens, the State Law applied to every person doing business in or with Burma. The Supreme Court stated that, in this respect, there was a conflict between the State Law and federal regulations. Finally the Supreme Court held that the State Law infringed the authority of the President of the United States to conduct diplomacy with other nations and was unconstitutional for this reason.

This case is a domestic case in the United States. However, the subject matter dealt with in this case was also that of the WTO Agreement. It is significant that the Supreme Court mentioned the fact that some nations brought claim against the United States in the World Trade Organization and relied on this fact to claim that the matter belonged to the diplomatic power of the President.

C. Japan

As stated earlier, Article XX of the Agreement requires that Parties to establish challenge procedures with which foreign enterprises can lodge complaints against procurement entities on account of violation of the Agreement. Parties established such procedures in their domestic jurisdictions. In the following passages, a Japanese case will be discussed as an example of such dispute settlement at challenge procedures.

The Japanese Government established a dispute settlement body called The Office for Government Procurement Challenge System ("CHANS") within the Secretariat Office of the Cabinet. CHANS is authorized to receive complaints from foreign enterprises with regard to implementation

of the Japanese procurement entities under the GPA and issue recommendation to the entities in question. So far there have been three cases before CHANS and one case before the dispute settlement body established by the Osaka Fu.[28]

D. The Japan Railway ("JR") Case

One of these cases brought to CHANS is the Japan Railway ("JR") Case.[29] JR was originally part of the government running railways throughout the country and later privatized to a joint-stock company and is designated as one of the entities covered by the Agreement. The issue involved was the procurement by JR of an electronic system used to operate automatic ticket gates at train stations. JR held an open bid and Sony, a Japanese company, won the contract. Motorola, a U.S. company which was unsuccessful in the bid, brought a claim against JR before CHANS. The complaint was based on 4 grounds, i.e. (a) non-adoption of international standards, (b) the use of specifications which cause unnecessary obstacles to international trade, (c) an inappropriate use of advice, (d) an unreasonable period for offering a trial product and the final product and (e) an improper opening of bids. A rule established by CHANS states that a complaint should be made within 10 days after specifications were handed down. In this case, however, Motorola submitted a complaint after this period expired. CHANS, therefore, held that the complaint by Motorola must be rejected for the reason that it was submitted untimely. However, CHANS went on to express its view of the above claims. Only items (a) and (b) will be discussed below.

At the time of dispute, a draft of international standard concerning the electronic devices involved in this case was examined by ISO. This standard is called ISO/IEC144431 TypeB ("TypeB") and, on this, "Final Draft International Standard" ("FDIS") was about to be adopted. Motorola argued that the GPA requires that domestic standards be based on international standards and the adoption of international standard was imminent. It argued that, when domestic standards are adopted, they should be based on FDIS.

CHANS held that Article 6:2 of the Agreement requires that domestic standards be based on international standards "when they exist" and that it was clear that FDIS had not been adopted when the bid was made. On this ground, CHANS rejected the claim of Motorola.

Motorola claimed that TypeB was a *de facto* standard and should have been based on by JR in its procurement. However, CHANS held that TypeB

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[28] These cases are briefly summarized in Attachment 6 of the document cited in *supra* note 6.

[29] *Report of CHANS* (Oct. 3, 2000). This Report in Japanese is available at http://www/cao.go.jp/access/japan/chans_main_j.html-12k.

did not reach a level of *de facto* standard.

JR announced that it would use IC card system that it had developed jointly with Sony, the successful bidder. Motorola argued that it amounted to an inappropriate use of advice rendered by the successful bidder. On this issue, CHANS held that the mere fact that JR had jointly developed IC card system with Sony did not mean that JR had inappropriately relied on advice rendered by Sony in the procurement of the system in question in this case.

There is difference between the GPA and the TBT Agreement in the treatment of international standards that are not adopted yet but their adoption is imminent. Article 2.4 of the TBT Agreement contains the wording that an international standard whose adoption is imminent should be relied on by Members when adopting domestic standards. However, the word "imminent" is lacking in the Agreement. CHANS, therefore, took a literal interpretation and decided that the Agreement did not cover a draft of international agreement although its adoption may be imminent. This seems clear from textual analysis of both Agreements. However, it is significant that this interpretation was recognized by CHANS.

On the other hand, the remark of CHANS on *de facto* standard is misplaced. By glancing through the tests of the Agreement, it is clear that *de facto* standards are not covered by the Agreement. CHANS stated that Type B was not a *de facto* standard. This may have been simply a response to the claim of Motorola that Type B was a *de facto* standard and should have been relied upon. However, this statement is misleading because, by *a contrario* interpretation, a *de facto* standard could be regarded as being covered by the Agreement if it is established as *de facto* standard. This was probably not an intention of CHANS. It seems, however, a wise policy for a dispute settlement body to refrain from stating something that may be misleading.

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Exhibit 10

CHAPTER 11

Issues Regarding Parallel Importation of Trademarked and Patented Products and Competition Policy in Japan

Mitsuo Matsushita[*]

1. Initial Remarks

Issues regarding parallel importation of goods under intellectual property laws have been regarded in Japan as those of the Patent Law, the Trademark Law and the Copyrights Law. In the area of the Trademark Law, the case law has been established that parallel importation of genuine goods covered by a trademark should be allowed. Under the Patent Law, although the Supreme Court in the *BBS* Case allowed parallel importation of patented goods under some conditions, the legal situation is less clear. (Issues regarding parallel importation of products covered by the Copyrights Law is omitted due to time constraint.)

Article 23 of the Antimonopoly Law of Japan (the AML)[1] provides that a conduct which amounts to an exercise of a right under the intangible property rights is exempted from the application of provisions of the AML. Traditionally rights under the Patent Law, the Utility Model Law, the Trademark Law, the Design Law (they are referred to as the industrial property rights) and the Copyright Law have been regarded as intangible property rights. In addition to those, however, the exercise of rights under such laws as the Integrated Circuit Law should be regarded as an exercise of intangible property rights.

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There are many arguments regarding what constitute the exercise of such rights among academics, government officials and lawyers. However, no prevailing view has emerged and case law doctrines have not been firmly established yet. An exclusion of a product which infringes a right under any of the intangible property laws by legal action is certainly deemed to be an exercise of a right. A collection of royalty under a license of any of such rights is another example of an exercise of right. Cases dealing with this issue are quite scanty.

The preamble to the Civil Code of Japan contains a statement that abuse of rights is not permitted. Under this provision, an abusive exercise of a patent, trademark or any other rights is presumably not permitted. Therefore, even if one owns a patent right, trademark rights or other rights under the heading of the intangible property rights, an ' abusive exercise' of such a right could be challenged under the AML. This is, however, an extraordinary situation, and, again, there are little case law developments.

2. Parallel Importation of Trademarked Goods under the Trademark Law

In the area of trademark law, parallel importation of genuine goods is generally regarded permissible. The landmark case in this area is the *Parker Fountain Pen* case decided in 1970 by the Osaka District Court.[2] The issue involved in this case was a parallel importation of fountain pens produced by Parker Company in the United States. Parker designated Shuriro Trading Company as the sole agency of Parker fountain pens in Japan and Shuriro registered the exclusive right to use the trademark 'Parker' in Japan. Due to the monopolistic position of Shuriro regarding the product, the price of Parker fountain pens in Japan was quite high. A company (MNC Company), desirous of engaging in parallel importation of Parker fountain pens from a third country, requested to Shuriro to grant a license to do so. When Shuriro refused to grant a license, MNC initiated a lawsuit in the Osaka District Court and sought a judgment that Shuriro had no right under the Trademark Law to block parallel importation of genuine Parker fountain pens into Japan.

The court handed down a decision and upheld the position of the parallel importer, MNC on the following ground. There are two essential elements of a trademark and, as long as those two essential elements are not injured by parallel importation, there is no infringement of the trademark. The two essential elements are: first, the identification of origin and secondly the guarantee of quality of the trademarked goods. The court reasoned that a trademark right was not infringed if those two essential elements are secured.

Even if a Parker fountain pen was imported by a parallel importer, the requirement for identification of origin was maintained since the imported

product was a genuine Parker fountain pen and was indeed produced and originally sold by Parker. Likewise a parallel importation of a Parker fountain pen by a parallel importer would not impair the guarantee of quality because it was a genuine Parker fountain pen. On the basis of the above reasoning, the court held that Shuriro had no right to block parallel importation of genuine Parker fountain pens.

Shortly after this decision, the Bureau of Customs and Tariffs of the Ministry of Finance modified the enforcement policy of Article 21 of the Customs and Tariffs Law which provides that a product which infringes intangible property rights in Japan shall be stopped at the border and allowed parallel importation of genuine trademarked goods into Japan. This decision opened the gate for parallel importation not only for Parker fountain pens but also for all sorts of consumer goods and high prices of many of branded products (Johnny Walker whisky, high valued Swiss watches, high valued ties, etc.) went down considerably.[3] Nowadays department stores and supermarkets engage in large scale parallel importation of branded goods from abroad.

The holding of the *Parker* case seems to have been generally accepted among government agencies, lawyers and academics although there is dissatisfaction for this decision among enterprises which act as sole agencies for foreign exporters, the business community in general takes this decision for granted.

It is to be noted, however, that the *Parker* decision is not a Supreme Court decision and, if a lawsuit occurs and one of the parties challenges the legality of parallel importation of genuine trademark goods, the possibility that this decision is overturned cannot be ruled out. At this point, such a lawsuit is unlikely to happen since, as mentioned before, the doctrine of the *Parker* decision is so well known and widely accepted and this discourages a future potential litigant from bringing this issue to court. As liberalization of trade progresses, however, a foreign company which owns a trademark in Japan and in whose mother country parallel importation of a genuine trademarked goods is not allowed may decide to challenge it.

The court in the *Parker* case decided the issue on a 'theoretical ground', e.g., on a certain view of the essential features of a trademark. This approach is in sharp contrast to the text of the Trademark Law. Articles 30.2/37.7 of the Trademark Law define an exclusive right to use a trademark exclusively and an infringement of exclusive right is defined as including import of a commodity bearing the mark in question. Therefore, the wording of the Trademark Law may be interpreted to suggest that there should be no parallel importation of a genuine trademarked goods as long as there is no license given by the owner of the trademark in question or the exclusive licensee thereof. The court based its judgment on the objective of the Trademark Law.

There could be room for debate whether the literal interpretation faithful to the text of law or the objective of the law should be given priority.

3. Parallel Importation of Patented Goods under the Patent Law

In the area of patents, the legal situation is not quite the same as it is in the trademark area. Let us examine the case law developments first.

In 1969, the Osaka District Court held that a product that was covered by a patent in Japan could not be lawfully imported into Japan by a parallel importer. This is the *Brunswick* case which involved the parallel importation of bowling pins covered by a patent owned by Brunswick Corporation (a U.S. company).[4] Brunswick owned a patent covering bowling pins in Australia and Japan as well as in other countries. Brunswick licensed its patent to a third party in Australia and this party manufactured bowling pints there and sold them. The bowling pins were imported into Hongkong and a person in Japan intended to import them into Japan.

Brunswick brought a lawsuit against this person alleging that the bowling pins in question were covered by the patent it owned in Japan and importation of the bowling pins into Japan constituted an infringement of its patent. The court agreed with this allegation and granted a remedy to Brunswick on the ground that, whereas the patent right with regard to the bowling pins in question was exhausted in Australia, the patent right in Japan covering the same subject was not exhausted since the patent in Japan was based on the Patent Law in Japan and should be regarded as independent from any other corresponding patents covering the same subjects in other countries.

After more than 20 years, this issue was revisited by a lawsuit brought by the BBS Company (a German company producing wheels for automobiles). BBS owned a patent in Germany and Japan as well as in other countries. BBS produced and sold wheels for automobiles both in Germany and Japan. Apparently there was a large difference between the price of this product in Germany and Japan and there was a company in Japan which intended to purchase the product in Germany from third parties and import them into Japan. BBS claimed that such a parallel importation constituted an infringement of the patent it owned and lawsuit occurred.

BBS prevailed in the Tokyo District Court which held that the parallel importation constituted an infringement of the BBS patent.[5] On appeal, the Tokyo High Court adopted the international exhaustion doctrine and held that once BBS sold the product in Germany, its patent right was exhausted not only in Germany but also in Japan.[6] On petition to the Supreme Court, the case was examined by the Supreme Court.

On 1997, the Supreme Court handed down a decision.[7] The gist of the decision is that, when a person owned a patent in a foreign country and Japan and a product covered by the patent was sold, it was presumed that the patentee implicitly granted the right to import the product into Japan by a third party unless the patentee expressly notified to the first purchaser of the product in the foreign country when the first sale took place that importation of the product was not allowed and affixed a sign on the product to that effect. The Supreme Court reasoned that this presumption of implied license was reasonable when considering the degree of globalized business transactions in which the legal stability was vitally important.

The decision of the Supreme Court did not adopt the doctrine of international exhaustion in its pure form. Under this ruling, the patentee can block a parallel importation into Japan of a product covered by the patent which it owns in Japan and the country of exportation as long as it notifies the first purchaser its intention of not allowing a parallel importation into Japan and affix a sign indicating that intention. If the patent in question was exhausted in the country of exportation and in Japan also at the first sale of the product in the country of exportation, how can the patentee attach a condition that the product cannot be imported by a third party into Japan?

The decision of the Supreme Court was a compromise between the view held among academics and some lawyers advocating for the liberalization of parallel importation of patented products and the view entertained among some sectors of the business community which maintain the traditional doctrine that a patent registered in a country in independent from any other corresponding patents registered in other countries and a patented product cannot be imported into Japan even if the product was duly sold in a foreign country.

This decision tried to strike a balance between the demand for liberalizing parallel importation supported by important groups among academics and that for maintaining the *status quo* of the traditional interpretation based on the territorial principle held by some important business groups including the pharmaceutical industries. Whatever the intention of the Supreme Court may have been, this decision probably created more legal uncertainty than certainty. Under this ruling, whether or not a parallel importation into Japan of a patented product is allowed depends on the expression of intention made by the patentee in a foreign country. How can a parallel importer in Japan find out about it? Also it depends on whether that intention is represented on the product in question. What if that representation was lost by attrition during the process of transportation? If a parallel importer which is an innocent third party imported the product, is it held liable under the Patent Law? These are some practical questions that may arise in the context of this decision.

It is not certain what changes of enforcement policy of Article 21 of the Customs and Tariffs Law have been made by the Bureau of Customs and Tariffs of the Ministry of Finance regarding parallel importation of patented goods. Since the Supreme Court has spoken on this subject, the Director of Customs and Tariffs is obligated to change the enforcement policy of Article 21 of the Customs and Tariffs Law to make it conform to the decision of the Supreme Court. However, due to unclearness involved in the Supreme Court decision, the liberalization of parallel importation of patented goods under Article 21 of the Customs and Tariffs Law must be conditioned on factors which surround a parallel importation of a patented product.

However, now that the Supreme Court has taken a position on this issue, this is the legal doctrine with regard to this question in Japan until such time comes in future when this issue is taken up in courts again.

4. Competition Law Implications of Parallel Importation of Trademarked and Patented Goods

As long as parallel importation of products covered by patent, trademark or other rights in Japan constitutes an infringement of rights under a law such as patent law and trademark law in Japan, the conduct of a party which possess the right to exclude parallel importation of such products either through lawsuit in courts or an application to the Customs House to stop the importation of such products at the border does not generally constitutes a violation of the AML since the exercise of rights under intangible property rights is generally exempted from the application of the AML. As mentioned earlier, Article 23 of the AML clearly states that the exercise of rights under the intangible property laws is exempted from its application.

However, as mentioned earlier, the preamble of the Civil Code declares that abuse of rights is not permitted. Although this statement is found in the preamble of the Civil Code, this can be interpreted to be a statement of general principle in jurisprudence. Therefore, even if a person's conduct formally amounts to an exercise of right, that conduct is not justified when it amounts to an abuse of that right. Likewise, in the area of intellectual property rights, although a conduct of the owner of a patent to exclude the use of the technology on which the patent is granted or of the owner of a trademark to exclude the sale of a commodity bearing that mark appears to be an exercise of the right under the patent law or the trademark law, such an exercise is not allowed if it amounts to an abuse of right.[8] In this situation, presumably, the AML would apply.

As mentioned earlier, the *Parker* decision has established that parallel importation of genuine goods did not constitute an infringement of a trademark right in Japan. It follows, therefore, that an exclusion on the part of

the owner or exclusive licensee of the trademark of parallel importation of genuine goods which bears the same trademark is subject to the application of the AML. Depending on the degree of seriousness of violation, such an exclusion can be either a private monopolization under Articles 2.5/3 or an unfair business practice under Articles 2.9/19 and the General Designation of Unfair Business Practices announced by the Fair Trade Commission (the JFTC).[9]

Since the *Parker* decision, the JFTC has acted on a number of occasions to prohibit attempts on the part of sole import agencies which registered exclusive right to use these brands to suppress parallel importation of genuine goods. There are some case law developments in this area. Theses case law developments are reflected in Part 3 of the Guidelines on Distribution and Trade Practices issued by the JFTC in 1991 (the Distribution Guidelines) as part of the measures taken as the result of the Structural Impediments Initiative (the SII), a trade negotiation between the United States and Japan. Therefore, we turn briefly to the content of the Distribution Guidelines.[10]

Section 3 of Part 3 of the Distribution Guidelines is devoted to setting out rules of the AML on undue blocking of parallel importation by sole import agencies of parallel importation of genuine trademarked goods.

- Generally parallel importation has the effect of maintaining price competition and, if it is unduly hindered, this is a violation of the AML. On the other hand, in cases in which products imported by parallel importation are not genuine products or, even if they are genuine products, their quality deteriorates and the health of users or the safety of products is adversely affected, sole agencies can legitimately block parallel importation of such products.
- Interference on the part of sole agencies into procurement by parallel importers of genuine goods from abroad constitutes an unfair business practice. This includes conduct such as: to cause a foreign supplier to stop selling products to a parallel importer in Japan when the parallel importer proposes to the foreign supplier to purchase products or to cause such supplier to stop selling by detecting sources of such supply through identifying product numbers attached to the product and denouncing them to the foreign supplier.
- Imposition on the part of sole agencies the condition on distributors that the latter cannot sell products which they purchased from the former to retailers which handle products imported by parallel importation constitutes an unfair business practice if its effect is to maintain the retail price of the products in question.

- Legal or non-legal action, without good cause, on the part of sole agencies to exclude genuine products imported by parallel importation by coercing distributors which handle such products to stop handling them by claiming that they infringe the trademark owned by the sole agencies constitutes an unfair business practice except for the fact that trademark owners can legitimately exclude false products which bear the trademark they own.
- Buying up of genuine products imported by parallel importation by a sole agency amounts to an unfair trade practice if it is exercised for the purpose of removing the products from the market and maintaining the price of the products.
- Refusal to repair genuine products imported by parallel importation on the part of sole agencies amounts to an unfair business practice if such refusal is done for the sole reason that the sole agencies did not sell the products in the situation where sellers other than the sole agencies cannot provide adequate repair services to customers.
- Undue interference into sales promotion activities of products imported by parallel importation on the part of sole agencies.

Conducts enumerated in the Distribution Guidelines are an illustrative rather than exhaustive list of conducts that come under the prohibition of the AML. There can be other conducts which are prohibited as unfair business practices. However, the above are conducts to which the AML were applied.

In the area of patent, since parallel importation of patented goods has been allowed by the BBS case under some conditions, the AML applies when similar activities as above occur which would prevent patented products from coming into the Japanese market. However, whereas in the trademark area courts have explicitly stated that parallel importation of genuine products did not constitute an infringement of trademark, the ruling of the Supreme Court decision in the BBS case is less clear. As explained earlier, it did not rule that the right of patent is internationally exhausted when the first sale of the covered product was made somewhere in the world in which the patent is registered. The ruling of the Supreme Court is that the intention on the part of the patentee to allow parallel importation of the covered product into Japan is presumed unless the patentee expressly stated at the time of the first sale of the product that parallel importation is not allowed.

The JFTC cannot generally prohibit a blocking of parallel importation of a patented product into Japan on the premise that the first sale abroad has exhausted the patent right of the product. A case-by-case judgment is necessary to determine whether a particular parallel importation of a patented product amounts to infringement of the patent in Japan or not. This makes it

extremely difficult for the JFTC to draft guidelines which would generally regulate conducts relating to parallel importation of patented products.

In abstract, there is room to argue that the AML would apply to conducts on the part of a patentee and sole import agencies which unduly interfere with parallel importation. However, compared with the trademark area, the issue of applicability of the AML to blocking of parallel importation of patented products is more uncertain.

NOTES

1. For details of the Antimonopoly Law of Japan, see H. Iyori and A. Uesugi, The Antimonopoly Laws and Policies of Japan (New York: Federal Legal Publications, Inc., 1994).
2. Decision of Osaka District Court, February 27, 1970, Mutaishu (Intangible Property Law Reporter), Vol. 2, p. 71 et seq.
3. See for details, M. Matsushita, Regulation of Sole Import Distribution Agreement under the Japanese Antimonopoly Law, The Japanese Annual of International Law, Vol. 18, p. 66-82 (1974).
4. Decision of Osaka District Court, June 9, 1969, Mutaishu (Intangible Property Law Reporter), Vol. 1, p. 16 et seq.
5. Decision of Tokyo District Court, July 22, 1994, Hanrei Jiho (Court Cases Reporter), No. 1501.
6. Decision of Tokyo High Court, March 23, 1995, Hanrei Jiho (Court Cases Reporter), No. 1542.
7. Decision of Supreme Court, July 1, 1997, Hanrei Taimuzu (Court Cases Times), No. 951, p. 105 et seq.
8. Abuse of a right has been rarely recognized in Japanese courts. However, there are a handful of cases in which courts held that an exercise of a right amounted to abuse and consequently refused to give it a legal effect In intellectual property law area, one Supreme Court case is reported in which the exercise of trademark right was denied for the reason that it amounted to an abuse of right. In this case, a person applied for registration of a trademark which represented 'POPEYE' and, combined with it, a comic in which 'POPEYE' was placed. A trademark was granted. However, at the time of registration, the name 'POPEYE' was widely known among the public as the figure associated with the comic. A third party sold a commodity with a sign consisting of just 'POPEYE' after receiving a license from the copyright holder of the comic. The trademark owner brought a suit for injunction against a person who sold the commodity. The Supreme Court held that the assertion of the trademark in the situation amounted an abuse of right. See the Supreme Court Decision, July 20, 1990, *Minshu* (Civil Cases Reporter), Vol. 44, No. 5, p. 876 et seq.

9. On unfair business practices, see I. Iyori and A. Uesugi, *supra.*, note 1, pp. 104-153.

10. See, generally, M. Matsushita, Japanese Anti-trust Law in the Context of Trade Issues, in *Japanese Commercial Law in an Era of Internationalization* (ed. H. Oda, Graham & Trotman/Martinus Nijjoff, 1994), pp. 1-39.

Exhibit 11

OSAKA DISTRICT COURT, FEBRUARY 27, 1970.*

International Law—Lex Locus Trademark Protection—Origin of Famous Trademark Goods the Place of Manufacture—Infringement of Exclusive License for Sale

DESIGNATION OF CASE:

Judgment of February 27, 1970, Osaka District Court, Case No. 7003 (*wa*, civil) of 1968.

PLAINTIFF:

N. MC. Co., Ltd.

REPRESENTATIVE OF PLAINTIFF:

Jinichi Aki

ATTORNEYS FOR PLAINTIFF:

Daijiro Yoshikawa, Ryuichiro Hirai, Akinobu Ono

DEFENDANT:

Schulyro Trading Co., Ltd.

ATTORNEYS FOR DEFENDANT:

Yoshio Koga, Koichiro Nakamoto, Akira Kawamura

JUDGMENT:

The following decision shall be rendered upon the above parties' case in which the plaintiff requested a declaratory judgment to nullify the defendant's injunction against the import and sale of certain goods by the plaintiff.

DECISION:

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* *Hanrei Taimuzu* (The Law Times Reports) No. 234, p.57.

The defendant is not entitled to an injunction, based upon his exclusive license to use the registered trademark No. 171867, against the plaintiff's import and sale of fountain pens, ballpoint pens and their parts bearing the trademark "PARKER", which were manufactured by the Parker Pen Company, an American company. The plaintiff's other claims shall be dismissed. The costs shall be borne by the defendant.

FACTS:

[*First.*] The attorneys for the plaintiff asked for judgment similar to the first sentence of the above decision and that "the defendant shall not interfere with the import and sale of the goods specified in the last paragraph of the above decision." The attorneys for the defendant demurred to the said plea for nullification of the injunction, and requested that "the plaintiff's pleas be dismissed and that the litigation costs be borne by him," and additionally, that the pleas on the merits of the case also be dismissed.

[*Second.*] The attorneys for the plaintiff alleged causes of action as follows:

I. The plaintiff is a corporation engaged in the business of importing and exporting electric and sundry goods, and the defendant is a foreign corporation with a head office in Canada and branch offices in Tokyo and Osaka, engaged in international trade and the manufacturing and sale of various goods. The defendant has been granted a royalty-free, exclusive license to use Japanese registered trademark No. 171867, "PARKER", which is owned by the Parker Pen Company (hereinafter referrred to as "Parker Co."), a non-party American corporation, with respect to specified goods of fountain pens, pencils—especially mechanical pencils—and ink, by agreement with the Parker Co., which agreement has been renewed and registered every two years since January 1, 1964.

II. The plaintiff executed a sales agreement with Lylian's Company, Hong Kong, to purchase and import into Japan 600 fountain pens manufactured by the Parker Co. and bearing the trademark "PARKER". Such goods have already been sent to the port of Osaka and are stored at the Customs Bureau. On May 24, 1968, plaintiff submitted an application to the Osaka Customs Bureau to import the goods in issue, and thereafter was informed orally, and later in writing on October 31, 1968, by the Osaka Customs Bureau that importation of the goods could not be permitted without the defendant's approval because it fell under the definition of prohibited import of goods under Article 21 (1) iv of the Customs Tariff Act (infringement of trademarks) and that the defendant had submitted "claims for injunctions against the import of

certain goods which would infringe the defendant's intangible property rights" (upon the basis of the Ministry of Finance Directive (Customs) No. 522 of May 31, 1966) in order to prohibit the import of the above mentioned goods, alleging that the import by a third party of the fountain pens at issue bearing the registered trademark "PARKER" would infringe the defendant's exclusive license to use the trademark.

III. According to the explanation of the Osaka Customs Bureau, "With respect to the case concerning Article 21 (1) iv of the Customs Tariff Act, unless the rightful person concerned submits claims to enjoin an import, it is practically impossible for the Customs Bureau spontaneously to check and inspect all goods designated to be imported, and it has been the practice of the Customs Bureau not to do so without such a presentation of claims. In the present case, since the defendant had submitted a claim for injunction beforehand, the Customs Bureau presumed, and acted accordingly, that the fountain pens which the plaintiff intended to import would fall under Article 21 (1) iv of the Customs Tariff Act by virtue of Section 37 v of the Trademark Act, but it is impossible for the Bureau to determine whether the goods designated for import are 'fake' or 'imitation' or 'genuine' goods of the Parker Company. On several occasions, the Customs Bureau asked the defendant for assurance that he would insist on enjoining the import of even genuine goods, and he answered that, since he was willing to give his letter of approval with respect to genuine goods, the Customs Bureau should require the submission of his letter of approval for each import of genuine goods."

In response to this explanation, the plaintiff claimed and insisted to the Osaka Customs Bureau that the import of genuine Parker's goods cannot infringe the trademark and the license to use such trademark, and therefore, the plaintiff should be able to import such goods without the defendant's approval. Meantime, on August 20th of the same year, the defendant declared to the Customs Bureau that he would not approve the import of Parker's genuine goods by the plaintiff. Eventually, the plaintiff went to court and filed an action against the chief of the Osaka Customs Bureau for cancellation of the administrative action to prohibit the import of the goods in issue, and this case is still pending at the Osaka District Court, Case No. 674 *(u)* of 1968.

IV. However, the fountain pens bearing the trademark "PARKER" which the plaintiff wishes to import, and which were manufactured by the Parker Company which owned the trademark and affixed the trademark to the goods in its home country, the United States of America, were wilfully sold by the Parker Company. The plaintiff meant solely to import the goods through the Parker general agent in Hong Kong and Lylian's Trade Company. That is to say, the import at issue is one

of genuine goods, and it is entirely different in nature from the importation of fake or imitation goods, and besides, the owner of the trademark in the import country, *i.e.*, Japan, and in the manufacturing country is the same person in the view of the law. Furthermore, the Parker fountain pens which the plaintiff intends to import and the ones which the defendant has actually imported and sold are identical in terms of treatment by the designated country, Japan and in terms of quality.

V. In recent years, the problems of the domestic owner or licensee of a trademark of such internationally famous goods as "PARKER" has been discussed in various countries of the world as an important subject of study related to *lex locus* doctrine of trademark protection. The plaintiff does not mean to deny the *locus* nature of a trademark, but this *locus* nature of a trademark can be recognized only to the extent that it is related to state sovereignty and to the maintenance of the proper domestic order of commerce, and, therefore, it should not be absolutely restrictive having inherent limitations. Limitations of a *locus* nature should be considered in the light of the function of the trademark. To be more specific, it should be determined by balancing the various interests which are meant to be protected by the trademark system, including the interests of the consumer. Subsequently, the answer to the question of whether the owner of license of the trademark can enjoin the import of genuine goods by a third party varies depending upon each business, but so far as this case is concerned, the defendant has no right to prohibit the import of Parker Company's genuine goods by the plaintiff on the ground that the defendants holds the license to use the trademark "PARKER" because of the following reasons:

1. As is clear from reading Article 1 of the Trademark Act, the purpose of the protection of trademarks is "to maintain the business good-will of the person who uses the trademark, by doing so to contribute to the development of industries, and to protect concurrently the interests of consumers." Now, then, are these purposes to be prevented by the import of genuine goods by a third party?

In the first place, the trademark functions as a clue for consumers to trace the good-will with which the manufacturer of the goods has satisfied consumers in the origin of the goods and as a sort of warranty of their quality, and it symbolizes the past. The good-will accumulated in this way may be injured if fake, imitation, or inferior goods are sold bearing the same or similar trademark, but the good-will of the trademark owner, which the Trademark Act meant to protect, cannot be injured by the import of the same genuine goods by a third party other than the party to which the owner of the trademark sells in the domestic country. The same can be said in the case where the licensee of the goods does not manufacture them in the domestic country and merely imports and sells the goods manufactured by the owner

of the trademark in a foreign country. The reason is that the said trademark does not function as a clue to distinguish the origin of the goods as those of the exclusive licensee to use the trademark, but the consumer recognizes it as a thing which symbolizes the goods of the trademark owner, *i.e.*, the manufacturer, and therefore, it cannot be said that the exclusive licensee of the trademark has a separate and independent interest to be protected.

In the second place, it is said that the protection of trademarks serves to further free competition and to develop industries. The trademark enables the customer to distinguish the goods of competitors, and to choose fit merchandise in terms of quality, price and other elements from among similar kinds of goods manufactured and sold in competition, so that it creates competition for sales of cheaper goods of better quality and also stimulates the development of industries. Even if the import and sale of genuine goods by a third party is permitted, it would not have a bad effect upon competition in terms of quality but rather benefits consumers by promoting price competition.

In the third place, the consumer would be protected from buying imitation goods of an inferior qualtiy by maintaining the manufacturer's exclusive right to use the trademark. Even if the right to stop the import and sale of genuine goods with the same trademark cannot be granted to the person who holds the domestic right to a trademark belonging to a foreign manufacturer, the consumer's interests will be protected so long as the goods are the same as those produced by the manufacturer. That is to say, there is no difference in the degree of consumer satisfaction between genuine goods bearing the trademark purchased through a foreign manufacturer's domestic branch or agent and those purchased through an independent trader in competition with the branch or agent, except where there is a difference in price.

Thus, in the light of the nature of trademark protection, it is hard to find reasonable justification in terms of trade-mark law for prohibiting the import of genuine goods by a third party only on the grounds of protecting the licensee's expectation to use the trademark as a means of monopolizing the domestic market.

2. In addition, the plaintiff has continued the import and sale of genuine Parker's fountain pens through Hong Kong as in the present case since the establishment of his predecessor, Aki Trading Company, Ltd. (this corporation was dissolved on August 1, 1965, and the plaintiff company was established on the tenth day of the same month by the same representative for almost the same purpose, succeeding to its predecessor's business entirely). The plaintiff had a conspicuous record of importing Parker goods before the establishment of the defendant's exclusive license to use the trademark "PARKER". During the period before the establishment of the license, the Parker Company had not given any warning or order to stop this importation and sale but

rather had enjoyed profits from the plaintiff's import and sale. It is not only evident that the plaintiff has never intended to obtain profits unjustly by "stealing a ride" on the defendant's advertisement activities after he obtained the exclusive license to use the trademark, but on the contrary, the defendant is trying to monopolize the domestic market, which the plaintiff had already developed, through its exclusive license.

3. Especially, in this case, where the "PARKER" trademark is an internationally famous trademark which indicates that the goods concerned were produced by the Parker Company, where the defendant does not manufacture the said goods but solely imports and sells goods bearing the trademark "PARKER" from the Parker Company, the original manufacturer, as its general agent in Japan, where many of the defendant's advertisements of the said goods have originated from the Parker Company in the United States of America, leading to the presumption that, although the used words are somewhat different, the defendant's advertisements are identical to those used in Hong Kong, in other words, the defendant follows the Parker Company's advertisement policies, where the defendant maintains close legal and economic relationships with the Parker Company, and in fact, although he uses the title "exclusive licensee" of the trademark, he is merely the Parker Company's sales agent in Japan, in such a case, the assurance of the defendant's exclusive right to import and sell is a matter that should be settled bewteen he and the Parker Company on the basis of their agency agreement, and it is beyond the scope of the protection by the tradmark law. Or rather, it is illogical to prohibit the import and sale of genuine goods by a third party on the ground of the existence of an exclusive license to use the trademark.

VI. Apart from those points raised above, the Parker fountain pens which the plaintiff wished to import from the Lylian Company in Hong Kong are those which the Parker Company manufactured in the United States with the "PARKER" affixed trademark, then exported to Hong Kong, where its dealer in Hong Kong sold them to the Lylian Company. Thus, the "PARKER" trademark has been duly used in the United States as the trademark which represents the manufacturer, and the rights based on the said trademark should be considered to be exhausted at the time of export from the United States to Hong Kong, or at the latest, at the time they are traded in Hong Kong. Therefore, in the light of this fact, the plaintiff's contemplated import and sale of the said goods cannot infringe the defendant's exclusive license to use the trademark.

VII. When upon presenting the "claims for enjoining the import" referred to in the statement of the Causes of Action II *supra*, the defendant was required by the Osaka Customs Bureau to explain the treatment of the import of genuine goods with

respect to the object of the alleged injunction, he answered that it was unnecessary to write down the exception because he would without fail submit a letter of approval for imports of genuine goods, especially for imports by the plaintiff. Shortly thereafter, he gave the same response when the plaintiff requested a general approval. In fact, thereafter the defendant submitted letters of approval for the plaintiff's imports on more than ten occasions. Taking these facts into consideration, it must implied that the defendant has agreed with the plaintiff to approve all imports of genuine Parker goods by the plaintiff. If this is true, it is a violation of the implied agreement for the defendant to change his attitude and declare that he no longer will approve imports of genuine Parker goods by the plaintiff. It must be understood that such recession of the inclusive approval cannot be lawfully done by a unilateral act of the defendant. Therefore, also from this fact, it must be said that the defendant does not have the right to enjoin the plaintiff's import of genuine Parker goods.

VIII. The use of a trademark must be conducted honestly and in good faith. The Parker Company lawfully affixed the trademark to the goods to be imported in this case and distributed them, and thus impliedly has approved the resale of the said goods. Therefore, such resale cannot be enjoined in light of the rule of estoppel. Although the defendant calls himself the exclusive licensee of the trademark, he is in reality a mere importer and dealer in the Parker Company's goods, so it is not a truthful and *bona fide* use of his right to use the exclusive trademark license to make it a ground for an injunction against the import and sale of the goods in question by the plaintiff. Even if this cannot be admitted, under the circumstances of this case such use of his right cannot be allowed because it is an abuse of that right to unduly restrict trade and prevent free commerce in the name of the *locus* nature of the trademark.

IX. Whereas, as mentioned above, the defendant submitted "claims for injunction against the import" to the Osaka Customs Bureau, and has recently declared that he would require the Osaka Customs Bureau to stop the import of even genuine goods, the import of genuine Parker goods by the plaintiff has been hindered, and the said import has not been allowed as a result of this hindrance. The circumstances of these facts are the same as those which have been already mentioned in the Causes of Action III *supra*.

Therefore, the plaintiff asked for recognition of the non-existence of the defendant's right to enjoin the plaintiff's import and sale of the said goods on the basis of the defendant's exclusive license to use the trademark.

[*Third.*] The attorneys for defendant expressed their statement of defenses concerning the preliminary claims and causes of action as follows.

I. Demurrer to Preliminary Claims

The part of the plaintiff's claim, requesting nullification of the defendant's right to enjoin the import and sale of goods should be dismissed. That is to say:

1. Although the defendant submitted, as the plaintiff alleges, "claims for injunction against the import of goods which would infringe the defendant's intangible property right" to the Osaka Customs Bureau in April, 1968, there is no direct relationship between the fact that the plaintiff cannot obtain the permit to import 600 Parker's fountain pens in question and the defendant's request for injunction against the said import. Because Article 21 (1) (iv) of the Custom Tariff Act provides that "property and things which infringe the trademark" . . . "shall not be imported," the chief executive of the Customs Bureau cannot permit the importation in case the cargo for which the import application is submitted is considered to fall under the classification of goods infringing the trademark. It is prohibited by law to render the decision of whether the designated import should be permitted, by depending upon whether the claim to enjoin the import has been submitted by the owner of the trademark. In this case, however, the Customs Bureau, in the name of its chief executive, admitted that the cargo which the plaintiff intended to import are goods which infringe the trademark in question, and decided not to permit the designated import. Therefore, the plaintiff is able to clarify his legal position most effectively by bringing an action against the chief executive to cancel the administrative act regarding the above mentioned refusal to grant an import permit, and in fact, the plaintiff instituted such administrative action to cancel the import refusal, which is now pending. Besides this action, there is no interest or necessity for the plaintiff to sue the defendant to nullify the defendant's injunction against the import.

2. The goods in question which the plaintiff intends to import are now kept at the customs storehouse, and, since the plaintiff cannot sell them, it is in actuality not the defendant who prevents the sales of the said goods. Therefore, with respect to the sale of the said goods, there exists, at least for the present, no legal dispute between the plaintiff and the defendant, except the possibility that a problem might arise in the future between them. To plead for a settlement such future relationship in terms of law is inappropriate, because it is of the same nature as pleading for a court's opinion on the interpretation of a statute or administrative order.

II. Defense to the Causes of Action

1. The alleged facts in the Causes of Action I, and the following among the alleged facts in the Causes of Action II, VII and IX can be admitted: That the defendant submitted to the Osaka Customs Bureau the "claims for injunction of certain goods which would infringe the defendant's intangible property" dated April, 1968, the content of which is identical with the plaintiff's allegations; that, although the defendant thereafter submitted more than ten times to the Osaka Customs Bureau letters approving the import of genuine Parker goods by the plaintiff, the defendant declared on August 20 of the same year to the Customs Bureau that it would no longer furnish letters of approval for importation of genuine Parker goods by the plaintiff; that the plaintiff brought an administrative action against the chief executive of the Osaka Customs Bureau to cancel the disputed administrative decision, and that this action is now pending; and that the defendant still has asked the Osaka Customs Bureau for the injunction against the import of genuine Parker goods.

2. Among the alleged facts in the Cause of Action VII, it must be denied that, when the defendant submitted the above mentioned claims to enjoin the import to the Osaka Customs Bureau, the defendant answered that he would without fail submit a letter of approval for the import of genuine goods by the plaintiff. The defendant answered that he would give such letter of approval only for genuine Parker goods which had already been delivered according to previous orders from the plaintiff or which were going to be ordered, and although the defendant has submitted a letter of approval even for later imports by the plaintiff, this does not imply that the defendant agreed to give the plaintiff a letter of general approval for the importation of genuine Parker goods by the plaintiff.

3. The rest of the plaintiff's actual and legal pleadings must be disputed.

III. Rejoinder to the Plaintiff's Allegations

1. An import of so-called genuine goods would infringe the rights of an exclusive licensee of a domestic trademark.

Concerning trademarks, the doctrine of *lex locus,* that the establishment and effect must be decided by the law of the country in which the right is granted, is a general rule which has been internationally accepted. The Paris Treaty of March 20, 1883, concerning the protection of intangible property, was amended at the London Conference of June 2, 1934, to include a new provision, Section 6 T, establishing the rule that a trademark registered in one country is independent of one registered in another country, and another provision, Section 6-4, setting forth the rule that a trademark can respectively be assigned or licensed for exclusive use in each country; these rules are also adopted in the Lisbon Amendment of October 31, 1958. In addition, the said rules are more clearly adopted in the Pan-American Treaties concerning the protection of

trademarks and trade names, and thus they are internationally accepted.

Indeed, it seems that an exception to those rules prevails in a very few countries with respect to the import of genuine goods, but our country belongs to the above mentioned Paris Treaty, and in the light of the purpose of the constitutional provision of Article 98 (2), it must be understood that an exception contrary to the above mentioned *lex locus* principle should not be admitted.

To view the matter from a comparative law standpoint, because of the political, economic and social background of those countries, for instance, Nordic countries, where the principle of *lex locus* is admitted with respect to patent law, the necessity for enactment of a uniform patent law is very strong, and so for trademark law, we can presume that those countries would accept a similar type of thinking. Member countries of the EEC Treaty are bound by the provision of Article of the Treaty which provides "That where one or more than two enterprises unduly takes advantage of his or their superior position in the common market or in a major part of the common market, so long as such advantage will influence the trade among member countries, it shall be deemed to be inconsistent with the idea of the common market, and shall be prohibited as such", and, since there is another provision which provides that, where intangible property is concerned the above cited provision shall be applicable, in accordance with this provision, to the patent law or the like of each member country, the courts are most likely to render judgments on a basis similar to the thought expressed in the above provision not only in cases concerning only member countries, but also in those related to non-member countries. Furthermore, in the United States of America, the text of the Custom Regulations is debated in many articles, but the United States has rigidly regulated monopolistic activities and the policy of promoting free competition has traditionally been very strong. In the light of the above, we see no basis for the argument that, as is expressed in some academic opinions in Japan, the Japanese courts should follow a certain practice or tendency which can be abstracted from a mere comparison of textual words in statutes and court decsions of various countries where there are different political, social and economic backgrounds from those of Japan. In the end, we feel that the academic opinion on which the plaintiff largely relies has no persuasive value.

2. The use of the defendant's exclusive license of the trademark in this case is obviously not an abuse of rights if we balance and conider the purpose of the Trademark Act and the concrete conditions of this case.

(1) That is to say, the Trademark Act is meant, on the one hand, to create and maintain a state of fair competition in commerce and trade, and to protect the interests of traders and consumers, and on the other hand, purports to protect the social and economic interests of property embodied in the trademark, but it has been generally

understood that the ultimate purpose of the law is not necessarily clear from the standpoint of existing law. And, in addition, there is a basic understanding embodied in the registration principle *(toroku shugi)* that the primary purpose is to protect public interests and maintain an order of fair competition, but, regardless of the primary purpose, the Trademark Act has been construed to protect trademarks as a property right, and this property nature of the trademark should not be disregarded.

The defendant has been the exclusive licensee of the "PARKER" trademark which is owned by the Parker Company, and the license agreement has been renewed every two years. At present, the defendant has held a registered exclusive license of identical content for an expanded period of six years since January 1, 1968. Where an exclusive license is established as in this case, even the owner of the trademark cannot import to Japan the specified goods bearing the registered trademark. This is true regardless of whether the imported goods are genuine or not.

It is only because such right has been granted that the defendant has made efforts to develop the sales market for Parker goods through an enormous amount of advertising costing in excess of 30 million yen a year up to the present time. Besides, since Parker fountain pens have their own particular structure and do not function satisfactorily as designed without the use of ink made by the Parker Company, the defendant, on the one hand, has assisted the promotion of the sales of Parker fountain pens by importing and supplying the Parker ink. On the other hand, the plaintiff has shown a certain sales record simply by stealing a "free ride" on the defendant's efforts to develop the market, without contributing to any promotion activities. Additionally, the plaintiff, knowing that the defendant is the holder of the exclusive license as explained above, takes advantage of the goodwill established by the defendant by purposely importing Parker goods to Japan through Hong Kong.

(2) From the beginning, the defendant has had no financial relationship with the Parker Company, and although he has engaged in the business of importing Parker goods from the Parker Company since around 1950 to date through its branch in Japan, its total sales of Parker goods is only about 15% of the amount of its annual sales. In addition, concerning the Parker goods, the defendant not only imports and sells the above mentioned ink, but also takes care of servicing them at after-sales service business offices which are established as independent operations in Sapporo, Tokyo, Nagoya, Osaka and Fukuoka. Such business offices are managed at the defendant's own expense, but the Parker goods which have been repaired at such offices are not limited to those imported by the defendant. In the light of these facts, the defendant is a corporation independent of the Parker Company, and it is obvious that it is not engaged in business as the so-called "hands and feet" of the Parker Company.

(3) The loss which the plaintiff will suffer from the defendant's exercise of his exclusive license to use the trademark is equivalent to the amount of profit the plaintiff

would expected to have obtained if he could sell the Parker goods against which the injunction was issued in this case. Besides, in spite of the fact that the plaintiff could easily have obtained permission to import if only he tried to obtain the defendant's approval, he did not request such approval, and thus the necessity for legal protection from damage in this case is very small.

(4) The plaintiff alleges that the plaintiff's import of genuine goods may benefit consumers and the state, and that it cannot injure such interests at all, but the consumers' interests cannot always be protected even if the plaintiff is allowed to sell Parker goods at a cheaper price than the defendant's price for identical Parker goods. The reason is that, if it is decided that the defendant cannot stop the import of genuine goods by a third party, the defendant may consequently lose its spirit and decide to stop its "after-sales" services. If this happens, it is doubtful whether the consumer in fact will benefit. The allegation that a cheapter price is a better policy is, as is clear from the above example, "short-sighted" and extremely naive, and is not acceptable. Concerning the plaintiff's argument that the state will be benefited by the recognition of the import of genuine goods by third party, the how and why of this argument is incomprehensible.

(5) It has been often argued that where the right of the owner or licensee of a registered domestic trademark to enjoin the import of genuine goods is recognized, the security of trade and free competition will be hindered, but under present day international competition, the manufacturer and seller of goods sholud be naturally allowed to engage in lawful competition in foreign markets by advertising, and using the trademark right as a weapon to expand the market and accumulate good-will through manupulation of markets by supplying goods of suitable quality at suitable prices in each foreign country. Therefore, the particular use of the exclusive trademark license right seen in this case is within the scope of the lawful aims of the contents of the trademark law, and we insist that this use should not be prohibited.

3. In sum, the plaintiff's arguments for the causes of action have no legal grounds, and therefore, should be dismissed.

[*Fourth.*] Evidence (omitted)

REASONS:

1. First of all, we will examine the defendant's preliminary pleading of demurrer. The following facts are not disputed by either party:

That the plaintiff is a corporation which is engaged in the business of export, import, and the like of electric goods and sundry goods; that the defendant maintains its head office in Canada and business offices in Tokyo and in Osaka; that plaintiff is a foreign corporation which is engaged in international trade, the manufacture and sale of various goods, and that he has been granted the exclusive license to use the registered

trademark No. 171867, "PARKER", which is owned in Japan by the Parker Company, a non-party American corporation, with respect to specified goods of fountain pens, pencils—especially mechanical pencils—and ink, by virtue of an agreement with the said Parker Company covering the territory of the whole land of Japan, applicable to all specified goods, and which has extended for periods of two years since January 1, 1964, which has been renewed every two years to date and registered as such for each renewal (In this regard, we understand from the defendant's Evidence No. 1, the admission of which is not in dispute between the parties, that in the meantime the period of duration of the exclusive license was expanded to six years after January 1, 1968, by the renewal agreement dated June 10, 1969, and registered on July 15, 1969). Looking collectively at plaintiff's evidence item No. 1, the admission which was not disputed, items No. 7-i through No. 7-xiii, the existence and admission of which were not disputed, the testimony by the plaintiff's representative and plaintiff's items of evidence No. 3-i through No. 3-iii, the existence of which can be admitted by the above testimony, items No.. 4-i through No. 4-ix, items No. 5-i and No. 5-vi through No. 5-xii (the part made by the Customs Bureau was not disputed and the rest can be obviously admitted by the above mentioned testimony), and items No. 6-i through No. 6-vii: The representative of the plaintiff corporation, Junichi Aki, was the president of the Aki Company, Ltd. which was engaged in the import and sale of sundry goods which the company had continuously imported since 1962 through a trading firm in Hong Kong so-called Parker goods, including Parker fountain pens, ballpoint pens, and other attachments and consumptive parts which the Parker Company manufactured in the United States of America and distributed bearing the "PARKER" trademark, and engaged in the sales of these goods in Japan. The said Aki Company was dissolved around August 1965, and the plaintiff corporation was established around that time by the same representative and for the same business purpose as that of the Aki Company. Thereafter, the plaintiff succeeded in fact to the business of the Aki Company and has continued to import and sell genuine Parker goods obtained from Hong Kong. Around April of 1968, the defendant submitted to the authorities of the Customs Bureau "claims to enjoin the import of goods which would infringe the defendant's intangible property rights" which is purported to justify an injunction against the import of the specified goods bearing the trademark "PARKER" by a third party (in this regard, there is no dispute between the parties). Thereafter the Customs Bureau took the position that it would not grant the import permit unless a letter of approval for such import from the defendant, the exclusive licensee of the trademark, was submitted for the import of the specified goods with the said trademark, regardless of whether they may be genuine goods which fall under the provision of [Article 21] (1) iv of the Customs Tariff Act which provides for "prohibited goods which infringe the trademark". As the result, concerning the plaintiff's import application to the Osaka Customs Bureau on

May 24, 1968, to import genuine Parker fountain pens purchased from Lylian's Trading Company in Hong Kong, the chief of the Osaka Customs Bureau answered the plaintiff in writing on October 31 of the same year, notifying him that he would not grant the import permit on the ground that the defendant's letter of approval was missing. Since there had been no opportunity for him to obtain the defendant's approval of the import after August 20th of the same year (the defendant had submitted more than ten times letters approving import of genuine Parker goods pursuant to requests from the plaintiff in order to obtain import permits from the Osaka Customs Bureau between April, 1968, until around August of the same year. On August 20th of the same year, the defendant declared to the Osaka Customs Bureau that it would not be willing to approve any additional importations by the plaintiff thereafter, and these facts were not disputed between them), the plaintiff's import and sales business of genuine Parker goods for the present is deadlocked because of the custom procedures. Thus the plaintiff brought an administrative action, which is still pending, against the chief of the Osaka Customs Bureau to the Osaka District Court asking for cancellation of the chief executor's refusal to grant the permit concerning the said 600 genuine Parker fountain pens for which the plaintiff had submitted the import application on May 24, 1969 (there is no dispute about the fact that the plaintiff brought the suit which is now pending). So it can be recognized that, if only the barrier of custom procedures could be clarified, the plaintiff is in a position to continue the import and sale of genuine Parker goods.

The defendant alleged as follows: The fact that the plaintiff cannot obtain the import permit from the Customs Bureau with respect to the 600 Parker fountain pens for which the plaintiff submitted the import application is due to the recognition of the chief of the Osaka Customs Bureau that said fountain pens infringe the trademark, and this inability to secure on permit is not directly related to the defendant's request to the Customs Bureau for an injunction against the importation; that the most effective and appropriate way to eliminate the unstable conditions of the plaintiff's legal status is to bring an administrative action against the chief of the said Customs Bureau to cancel his refusal to grant the import permit and there is no need or standing to sue the defendant for recognition of the non-existence of the defendant's right to enjoin the import; and that, as the plaintiff cannot sell the said fountain pens unless he is permitted to import them, no present legal dispute has yet arisen between the parties with respect to the sales of the said fountain pens, and it is unlawful to sue for a declaration of the non-existence of the defendant's right to enjoin the plaintiff's sales on the ground that such suit involves a recognition of a future legal relation.

However, even if the said refusal to grant the import permit by the chief of the Osaka Customs Bureau was done on the basis of the defendant's claim to enjoin of the

said import, as will be made clear in a later part (of this judgment), the refusal was made through his independent judgment and it is thus clear that the defendant's allegation that the plaintiff's import of the Parker goods at issue infringes the defendant's exclusive license to use the trademark does not absolutely reflect upon the chief of the Osaka Customs Bureau's refusal to grant the permit. Subsequently, even if the plaintiff wins the case against the chief of the Osaka Customs Bureau requiring the cancellation of the said administrative disposal, it is not necessarily true that the defendant, a non-party to that case, would spontaneously withdraw his allegation, and admit the plaintiff's legal claims in this case without any dispute between them, nor is it true that the decision of the said administrative action is binding upon the defendant. Therefore, the fact that the plaintiff brought the action to cancel the refusal to grant the import permit against the chief of the Customs Bureau, or the fact that such action is now pending before the court cannot be considered as grounds for denying the plaintiff's standing to ask for recognition of the non-existecne of a legal relationship with the defendant; As mentioned above, so long as the defendant maintains his legal allegation which is different from the plaintiff's there is a dispute between the plaintiff and the defendant with respect to the said legal relations; and since the plaintiff is relying upon an unstable legal position that may require him at any time to stop the import and sale, etc., we must admit that there is standing to ask for the recognition of the non-existence of the right to enjoin the said important sale as against the defendant.

Thus, there is no ground for the defendant's demurrer to the preliminary claims.

II. Next, we will examine the merits of the pleadings to declare the non-existence of the right to enjoin the import and sale.

The plaintiff alleges that his import and sale of the specified goods, fountain pens, etc., manufactured and distributed bearing the "PARKER" trademark by the Parker Company, cannot injure the defendant's exclusive license to use the trademark, while the defendant disputes this point. Following is our decision in this regard:

1. The Parker Company, the owner of the registered trademark concerned in this case, is a famous manufacturer and trader of fountain pens with its headquarters in the United States of America. It affixes the "PARKER" trademark to its goods, exports them to many countries of the world. It is well-known that the Parker Company's goods always bear its internationally famous trademark. On the other hand, the defendant is a foreign corporation, having its headquarters in Canada and business offices in Tokyo and Osaka, which has engaged in international trade, manufacture and sales of various goods, and has been granted the exclusive license to use the trademark, "PARKER", in Japan since 1964. There is no dispute between the parties on these points. To look collectively at the plaintiff's evidence item No. 8, the estab-

lishment of which was not disputed, the plaintiff's authenticated evidence No. 1-iii and No. 2-iii, the advertisement pamphlets made by the Parker Company and distributed in Japan, the testimony of the witness, Shoichiro Miyamoto, the statement of the plaintiff's representative, the plaintiff's authenticated evidence Nos. 1-i and ii and Nos. 2-i and ii (the advertisement pamphlets made by the Parker Company and distributed in the United States of America and in Hong Kong), the establishment of which was proved by the said statement, the defendant does not manufacture the goods bearing the "PARKER" trademark, but only imports and sells Parker goods as "General Agent of the Parker Company in Japan" on the basis of an exclusive license to sell in Japan Parker goods, such as Parker fountain pens, etc., bearing the said trademark and that there is no variation in design, according to the tastes of customers in particular countries, between the paper goods distributed in the American market and those exported for Japan or for Hong Kong. Besides, because of the nature of the goods, it is unthinkable from the standpoint of common sense that their quality may be changed by handling, and therefore, we must admit that the Parker goods which the plaintiff imports from Hong Kong are exactly the same in quality as those which the defendant imports from the United States of America. Thus, we cannot admit any difference between them.

2. "The Paris Treaty of March 20, 1883, concerning the Protection of Intangible Property" (hereinafter referred to as "Paris Treaty"), Treaty No. 9 of the 40th Year of Showa, recognized that the principle of *lex locus* and of the independence of trademarks shall govern the matters concerning trademarks in the same way as other intangible property, and the London Amendment of 1934 makes it clear that the trademark is independent in each country where it is registered, and thus can be assigned or licensed independently.

It is understood that the principle of the independence of trademarks or *lex locus* means that foreign trademarks cannot be injured by a domestic act and domestic trademarks cannot be injured by a foreign act and that a domestic trademark exists independently of the foreign trademark registered by the same owner. However, when the Paris Treaty established the principle of *lex locus* of trademarks by including the provision of the London Amendment of 1934, Sections 6 T (at present, Section 6 (3) by the Lisbon Amendment), in the light of the conditions of international trade existing at that time, it is understandable that a case like the one at issue could not be foreseen by the framers of the Amendment. Besides, while the Amendment provides with respect to patent rights that the national independence of patent rights shall be narrowly construed under Section 4-2 (2) of the Treaty, it did not clarify the application of the same principle to trademarks. The question of to what extent the principle of *lex locus* of the trademark should be applied is not necessarily clear from

the textual interpretation of the Treaty and the Trademark Act of Japan. In order to solve this problem, we think it is necessary to examine the nature of trademark protection by tracing the origin of the law.

The Trademark Act, under Article 1, provides that "This Act is aimed at the maintenance of business good-will of the person who uses the trademark, contribution to the development of industry thereby, and at the same time, protection of consumers' interests, by way of protection of the trademark." The trademark symbolizes the goods which are traded by a specific business body, and it functions as a means to identify the origin of the goods, and concurrently, as a warranty of the uniformity of quality and nature of the goods to which the trademark is affixed. It is understood that the reason why the Trademark Act grants a monopolistic right to use the registered trademark to the owner of such trademark is to prevent injury of the "origin representation" function and the "quality warranty" function by an abusive use of the same or similar trademark with respect to the same or similar goods by a third party. The Trademark Act is designed to protect the trademark owner's goodwill which has been accumulated by the continuous use of the trademark as protecting the "origin representation" function and "quality warranty" function, and at the same time, a protecting the consumer's interests by maintaining order in the flow of commerce, by distinguishing the identity of the origin of the goods for the consumer, and by enabling the consumer to find suitable goods of appropriate quality so that he will not mistake his choice at the time of purchase. As mentioned above, the direct object of protecting trademarks is to ensure the functions of trade-marks and thereby, it is also aimed at the ultimate protection of public interest as well as the trademark owner's interest. In this regard, the trademark protects rights which have a very strong social and public nature in comparison with other intagible property. In a system which applies the registration principle, even ignoring the fact that the trademark fundamentally has the nature of private property, it is evident that the scope of its protection is naturally subject to social restrictions and the proper scope of the *lex locus* principle of the trademark must be reasonably decided after the consideration of whether or not the functions of the trademark are infringed in the light of the spirit of the protection of trademarks.

Where the same person registers the same trademark in both a domestic and a foreign countries, a number of court decisions in Europe declare that the extinction of a foreign trademark in the foreign country by distribution of goods should be considered to give the same extinguishing effect upon the same domestic trademark and that this is entirely unrelated to the principle of the independence of the trademark which is provided for in the Paris Treaty. The plaintiff, adopting that reasoning, argues that the Parker goods in issue to which the "PARKER" trademark was affixed were manufactured by the Parker Company in the United States of

America, were exported to Hong Kong where the dealer in Hong Kong sold them to the Lylian's Company. With respect to the goods, the plaintiff contends that the right concerning the affixed trademark was consumated at the time of the export from the United States of America to Hong Kong, or at the latest, at the time of the dealing in Hong Kong; we cannot readily agree with this reasoning.

However, we think that for a party to be entitled to enjoin a third party's act on the basis that it infringes his trademark he must prove not only that such act was done by a person having no right to do so but also that in substance, it was an unlawful act. In case the same person has registered an internationally well-known trademark both domestically and abroad, in determining whether a third partys' importation of goods bearing such registered trademark will constitute not only superficially but also substantially an unlawful act, we think that it is not inconsistent with the principle of the independence of trademarks to take into consideration such foreign facts as that trademark is well-known all over the world, that the said goods were produced in a foreign country by a rightful person, were sold after affixing the relevant trademark, and so forth.

3. Next, we will examine to what extent the plaintiff's import of genuine Parker goods will influence the function of the registered trademark at issue and the various interests concerned.

Although the existing Trademark Act does not separate theoretically the trademark and the business and recognizes the establishment of the exclusive or ordinary license with respect to such trademark, where the same legal person has made both domestic and foreign registrations for the same trademark, and especially internationally well-known trademarks as in the "Parker" trademark at issue, the trademark owner's purpose for establishing the exclusive license to use the trademark domestically is to give the exclusive licensee an exclusive distributorship to sell domestically the goods manufactured in a foreign country, and the case at issue is not an exception to this generalization. We consider that, in such case, the origin of the goods distinguished by such a famous trademark is, so long as special circumstances exist, the origin of manufacture of said goods and not the origin of the sale.

As has been shown above, the defendent merely imports from the United States of America the goods bearing the "PARKER" trademark affixed by the owner of the trademark, the Parker Company, and merely sells them in the domestic country, and no specified goods bearing the "PARKER" trademark are manufactured in Japan. It has long been a well-known fact among consumers in Japan that the "PARKER" trademark affixed to fountain pens is a symbol of foreign goods manufactured and sold solely by the Parker Company. According to the testimony of the witness, Shoichiro Miyamoto, the defendant started in 1964 an extensive import

business of Parker Company goods such as Parker fountain pens, Parker ink, and that presently, advertising of the said Company's goods amounts to an annual expenditure of between 70 million and 80 million yen. From these facts above, however, it is hard to admit that domestic consumers generally know that the "PARKER" trademark symbolizes goods distributed by a specific import and sales dealer in Japan.

If the above mentioned facts are true, since the Parker goods which the plaintiff wishes to import and sell are identical to the Parker goods which the defendant has imported and sold, there is no difference in quality between them. The danger of deceiving or confusing the consumer about the origin or quality of the goods does not exist. So it must be admitted that the functions of the trademark cannot be injured at all. Thus, if there is no fear of deceiving the consumer's reliance on the goods bearing the said trademark, there appears to be goods bearing the said trademark, there appears to be no harm, at least from the standpoint of protecting the consumer. It is also evident that the reputation and other business interests of the Parker Company, the owner of the trademark, cannot be injured. Besides, as to internationally well-known trademarks as the one in this case, the consumer would ordinarily purchase the goods attaching great importance to the reputation of the manufacturer symbolized by the trademark, without regard to whether such trademark is a domestic or a foreign one. Furthermore, the defendant's business good-will as the exclusive licensee of the domestic trademark is very close, or even inseparable, from the reputation of Parker goods in the world market, established by the Parker Company through the said trademark, and it is impossible to think that the defendant's good-will has a separate and independent existence. The inseparability of the defendant's business good-will from that of the Parker Company is illustrated by its authenticated evidence i through iii of Nos. 1 and 2 and the testimony of the witness, Shoichiro Miyamoto, that is to say, by the fact that the Parker Company, after granting the defendant the exclusive license to use the trademark, has borne 60% of the defendant's promotion and advertisement expenses of the Parker goods in Japan, has made efforts to service Parker goods in Japan, and has furnished the defendant for his use in Japan advertising pamphlets for the Japanese market printed in the United States of America, using sentences with the same meaning as those used for the American and the Hong Kong markets (though the words and their form are naturally different), employing the same pictures, layouts, and appearance of those for the American and the Hong Kong market. Therefore, since the plaintiff's import and sale of genuine goods may endanger the defendant's monopolistic control of the domestic market but does not injure the Parker Company's business good-will, the defendant's business good-will cannot be injured; but rather, if the import of genuine goods by a third party is permitted, fair, free competition will arise with respect to price, service, etc., in the domestic market, and consumers

will profit thereby. In addition, it will have merit in promoting international trade and stimulating the development of industries, and in sum, such results will conform with the purpose of the Trademark Act.

Incidentally, we will examine whether or not the plaintiff's import and sale will disorganize the order of fair competition. Although the defendant started extensive imports and sales of Parker goods in 1964, the name of Parker goods has been well-known in the domestic market long before that time, and the plaintiff's representative, Juichi Aki, had imported Parker goods from Hong Kong and sold them domestically since 1962 in the name of his Company, the Aki Trade Company. As explained above, that company was dissolved in 1965 and subsequently the plaintiff corporation succeeded to the Aki Company's business and continued the import and sale of Parker goods. In the light of the above history, it is hard to find that the plaintiff stole a "fiee ride" on, or took advantage of the defendant's advertisements of Parker goods and it is also hard to find that extremely unfair measures were used in the plaintiff's import produces.

4. To summarize what we have examined above, the plaintiff's import and sale of genuine Parker goods cannot be understood to be inconsistent with the purpose of the trademark system. It is difficult to use as the only substantial reason for prohibiting the plaintiff's import and sale the theory that the defendant's trademark monopoly over the domestic market may be jeopardized. Indeed, in superficial terms, the plaintiff has no right to use the registered trademark in this case, but the plaintiff's act of import and sale of genuine Parker goods is not unlawful in substance in light of the spirit of the Trademark Act, and it cannot constitute a violation of property rights.

Therefore, we admit that, among the plaintiff's arguments concerning the causes of action, the part in which he askes for recognition that the defendant has no right to enjoin the plaintiff's act of import and sale is true.

III. In the third place, we will examine the plaintiff's pleadings asking for a prohibition against the defendant disturbing the plaintiff's import and sale of genuine Parker goods.

Since we have already decided that the import and sale of the goods by the plaintiff does not constitute an infringement of the defendant's exclusive license to use the registered trademark, "PARKER", the business of import and sale by the plaintiff can be done freely and the plaintiff's business activities should be permitted. However, the concept of "the right to business or to free enterprise" is not protected as such under the legal system of Japan. The legal interest injured by interfering with business is a sort of liberty for free business activities, which in nature does not

have an exclusive effect, and therefore, if such liberty is unlawfully injured, the plaintiff can for damages on the grounds of the opposite party's tortious acts. But, except in a case where such reasons exist as may fall under any clause of Article 1 of the Prevention of Unfair Competition Act, the plaintiff is not necessarily entitled to enjoin the opposite party from creating such disturbance. It would be more reasonable to find that the plaintiff can sue to eliminate such injury to his liberty only when there exists special reasons such as that the means of business interferance by the opposite party is direct and done with unlawful force.

To apply this to the present case, the defendant submitted to the authorities of the Customs Bureau around April, 1968, the "claims for enjoining the import of the goods which would infringe the defendant's intangible property rights" which was aimed at obtaining an injunction of the import by a third party of the specified goods bearing the registered "PARKER" trademark. Thereafter, the Customs Bureau determined once and for all that so long as the specified goods bearing the said trademark are concerned, it would not give an import permit unless the applicant submitted the defendant's letter of approval of such import, even with respect to the so-called genuine goods, on the ground that such goods are prohibited property which infringes the trademark. As a result, the plaintiff could not obtain the import permit pursuant to his application to the Osaka Customs Bureau of May 24, 1968, for the planned import of 600 Parker fountain pens, genuine Parker goods, purchased from the Lylian's Company in Hong Kong, and thereby the plaintiff's import and sale business was disturbed. Yet the defendant has now asked the Osaka Customs Bureau to enjoin the import of even genuine goods. The above mentioned facts were not disputed between the parties.

According to Article 21 (1) iv of the Custom Tariff Act, those goods which infringe patents, process patents, design patents, trademarks or copyright, are prohibited goods for import, but, since the quantity of intangible property in Japan is enormous, it is practically impossible for the Customs Bureau to examine all goods covered in import applications to determine whether they are such prohibited goods which infringe intangible property rights. And certainly it cannot be denied that there may have been irregular cases where the import of prohibited goods was permitted by mistake. The Finance Ministry Order No. 52 of May 31, 1966, "The Procedures and Other Matters for the Claim of Injunction against the Import of Goods which Infringe upon Intangible Property", which is exhibited in the plaintiff's Evidence item No. 2, the establishment of which was not disputed, provides procedures for seeking injunctions against import on behalf of a person who holds an intangible property right, as a countermeasure to meet such irregular cases. According to this procedure he is required to submit to the chief of the Customs Bureau an application to enjoin the import, describing the substance of the right which he wishes to protest, the period

of desired protection, etc. The nature of such claim to enjoin an import is merely a stimulus to the proper administration of the officials of their custom examination through preparatory applications for protection through custom proceedings which control the import of infringing goods whose import can be foreseen. Therefore, even where such claim to enjoin the import is not submitted by the person entitled to apply, the chief of the Customs Bureau must not permit the importation of goods that obviously fall under the category of prohibited goods which infringe intangible property rights, and conversely, even where protection is desired by submitting such a claim to enjoin the import, the legal system requires that the chief decide in his own discretion and upon his own responsibility whether or not the goods covered by the import application fall under the category of goods infringing intangible property rights whose protection has been claimed. The opinion of the applicant is a mere reference for the decision, and it cannot in any way affect the chiefs' exercise of discretion.

This leads to the conclusion that, even if the plaintiff cannot obtain a permit to import the 600 Parker fountain pens, and his import and sale business of Parker goods is, or will be, hindered because there is no prospect for him to obtain the permit for the import of similar goods in the near future, this result arises from a prohibition of import made at the Customs Bureau chief's own discretion, and it cannot be said that it was caused by the defendant's direct intervention. In addition, since the defendent's claim to enjoin the import by a third party of specified goods bearing the registered trademark including genuine Parker goods, merely encourages the chief of the Customs Bureau to exercise his power with respect to making an official determination on the basis of an abstract interpretation of law which is not confused by any false factual elements, there is no doubt that the act cannot constitute "an act which injures a competitor's business good-will by stating false facts or spreading such facts" under the provision of Article 1 vi of the Prevention of the Unfair Competition Act.

In addition, because it is impossible to recognize that, in the light of all evidence presented in this case, the defendant, directly and with unlawful force, interfered with the plaintiff's act of the import and sale of the genuine Parker goods, we must decide that the part of the plaintiff's pleadings which asked for prohibition of the defendant's hindrance of the said plaintiff's act has no basis and that it shall be dismissed.

IV. Now, finally, with respect to the cost of this law suit, we render a judgment as shown in the DECISION, applying Articles 89, 92 and 95 of the Code of Civil Procedure.

Osaka District Court, The 21st Civil Division

Chief Judge: Kenjiro Ohe
Judge: Hirotake Kondo
Judge: Chuzo Maruyama

Exhibit 12

II. Private International Law

Trademark Rights — Claim of Infringement — Parallel Importing — Lack of Illegality

Supreme Court, Judgment, February 27, 2003:
57 Minshu (2) 125 [2003], H.T. (1117) 216 [2003]

Hit Union Ltd. v. THREE-M Ltd.

Fred Perry Sportswear Ltd. (hereinafter referred to as "FPS"), an English corporation, owns the trademark rights with respect to a series of Fred Perry trademarks. Osea International Pte Ltd. (hereinafter referred to as "Osea") entered a licensing contract with FPS for the use of the trademarks in countries other than Japan. Under the contract, Osea produced polo shirts bearing Fred Perry trademarks (hereinafter referred to as "the Goods"). THREE-M Ltd. (a Japanese corporation, the plaintiff and appellant) imported the Goods via Villa Pte Ltd., and sold them in Japan. The contract between Osea and FPS contains a provision that Osea promises not to enter any agreement without prior consent in writing from FPS with respect to a subcontract, or to produce, package, and furnish any of the articles covered in the contract. However, the Goods were manufactured by a subcontracted factory outside the licensed territory (in China) without the consent of FPS. Fred Perry Holdings, a 100 percent-owned subsidiary of Hit Union Ltd. (a Japanese corporation, the defendant and appellee), was granted the trademark rights by FPS, so thereafter Hit Union succeeded the firm of FPS.

Hit Union requested damages under the *Minpo* (Civil Code 1896, Act No. 89) Article 709, urging that THREE-M's act of importation and sale of the Goods to which Fred Perry trademark was applied in Japan infringed its trademark rights. THREE-M insisted that the importation of the Goods was not illegal, because it could be considered as an importation of genuine goods.

The Osaka District Court and the Osaka High Court rejected the defense of THREE-M on the grounds that the Goods cannot be regarded as genuine goods, and accepted the petition of Hit Union in part.

Edited by Yoshiaki Nomura and translated by Kent Anderson, Naoe Fujisawa, John Ribeiro and Paul Shepherd.

THREE-M appealed

Held: 'The appeal shall be dismissed.'
'The appellant shall be ordered to pay the costs of the appeal.'

Upon the grounds stated below;

'3 The importation of goods 'can be regarded as the so-called "parallel importation of genuine goods" and is not considered substantially illegal as an infringement of a trademark right, where (1) this trademark was applied lawfully by a person who was authorized to use the trademark or by an owner of the trademark in a foreign country, (2) the trademark can be identified as of the same origin as the registered trademark in Japan, because an owner of the trademark in the foreign country is or can be regarded as the same parson as an owner of the trademark in Japan for legal or economic reasons, (3) it can be considered that there is no substantial difference between the goods and goods on which the registered trademark is applied by the owner of the trademark right in Japan, because the trademark owner in Japan is in a position to conduct quality management of the goods directly or indirectly, with respect to the quality that is ensured by the registered trademark. The *Shohyo Ho* (Trade Mark Law 1959 Act No.127) Article 1 provides that the purpose of the law is to protect the goodwill of the trademark use by protecting the trademark, and thereby to contribute to a development of industry and to protect the interest of consumers. Due to the so-called parallel importation of genuine goods, meeting these requirements does not harm the functions of identifying origin and ownership, and assuring quality of goods, nor damage the goodwill of a user of a trademark and the interest of consumers, therefore it does not have substantial illegality.'

'4 Applying this to the facts of the case, we conclude that the Goods should harm the functions of identifying origin and ownership of trademark for the following reasons. Osea, having been trademark licensed in Singapore and three other countries for the trademarks in question, had the Goods produced by a subcontracted factory in China, which is outside the licensed territory, without the consent of FPS. It is clear that the Goods were manufactured and applied with the trademarks outside the scope of the license provided in the pertinent clauses of the contract in question.

The restrictions in the license clauses to limit the production within specified countries and the subcontracts are extremely important for the trademark owner to complete the function of assuring quality by controlling the quality of goods. The Goods produced in violation of these restrictions are not under the control of the trademark owner. This would cause a potential material difference in quality between the disputed Goods and goods distributed by the appellee Hit Union, with the likely result that the quality assurance function of the trademark may be harmed.

In consequence, if such exportation is allowed, it could likely damage the credibility of the "Fred Perry" name. Consumers have confidence that they can buy parallel importation goods of the same quality and of the same origin as goods which bear the registered trademark and are put in circulation by the trademark owner. Permitting exportation against any of the restrictions above may be inimical to confidence of the consumers.'

'For these reasons, the importation of the Goods is not regarded as substantially illegal for the reason that it cannot be regarded as a "parallel importation of genuine goods".'

Judge Kazuko Yokō (presiding)
Judge Takehisa Fukasawa
Judge Tatsuo Kainaka
Judge Tokuji Izumi
Judge Niro Shimada

Reasonable Causation — Letter of Credit — Claim for Damages — Advising Bank — Modification of Conditions — Amendment — Shipping Date

Supreme Court, Judgment, March 27, 2003; Kinyu Homu (1677) 54 [2003]

The Shanghai Commercial & Savings Bank, Ltd. v. Shinyō Shōji Company

The point in dispute introduced in this case is the reasonable and probable cause between the appellant's failure to promptly send the notice of amendments to a letter of credit, and damages incurred by the appellee.

The appellee (Shinyou Shouji), a Japanese corporarion specializing in the importation and distribution of men's, women's, and children's clothing, entered a sales contract (hereinafter "the Sales Contract") with Finiack Trading Company (hereinafter "Finiack") of Taiwan, for the sale and distribution of textile goods (hereinafter "the Goods"). Upon request from Finiack, the letter of credit (L/C), which was the agreed method of payment, was issued on January 5, 1998 by the appellant (the advising bank, The Shanghai Commercial & Savings Bank, Ltd.) to the appellant's Tokyo Branch via telegram appointing the appellant's Osaka Branch as the addressee, and requesting notification to the appellee thereafter. Accordingly, on January 6 the appellant's Tokyo Branch forwarded the original L/C to the Osaka Branch, upon which the appellee received notification of its issuance.

Exhibit 13

II. Private International Law

Parallel Import of BBS Car Wheels — Affirmation of Implied License Theory — No Infringement of Japanese Patent

Supreme Court, Judgment, 7 July 1997; 51 Minshu (6) 2299 [1997], Saibansho Jiho (1198) 8 [1997], NBL (621) 57 [1997], Kogyoshoyukenho Kenkyu (119) 23 [1998], H. T. (951) 105 [1997]

BBS, Inc. v. Racimex Japan et al.

Plaintiff and Appellant: BBS Kraftfahrzeugtechnik Aktiengesellschaft
Representative of BBS Kraftfahrzeugtechnik Aktiengesellschaft: Heinrich Baumgartner

Defendant and Appellee: Racimex Japan, Inc.
Representative of Racimex Japan, Inc.: Sinichi Inoue
Defendant and Appellee: Jap Auto Products, Inc.
Representative of Jap Auto Products, Inc.: Sinichi Inoue

The plaintiff-appellant (BBS Kraftfahrzeugtechnik Aktiengesellschaft) holds patents for the present invention both in the territories of Japan and the German Federal Republic (hereinafter the Japanese patent is called "the present patent" and the German one is called "the corresponding German patent"). The appellant produced and sold aluminum car wheels (hereinafter called "the present products") as articles under a patent in Germany after the corresponding German patent came into effect.

Defendant-appellee 1 (Racimex Japan, Inc.) had imported the present products into Japan and sold them to the defendant-appellee 2 (Jap Auto Products, Inc.) at least until August 1992, and the latter had sold them to the public at least until the same month. There was still the possibility that they would import and sell the present products in the future. So the appellant sued appellee 1 and appellee 2 to seek an injunction restraining the import and sale of the present products, as well as damages.

The Tokyo District Court granted the appellant's claim. Then appellee 1 and appellee 2 appealed. The Tokyo High Court ruled as follows. The appellant produced and sold the present products under the corresponding German patent in Germany. It is clear that the appellant

had an opportunity to be compensated for the disclosure of his invention. No facts are found to indicate that such opportunity was legally restricted at the time of distribution, so the present patent in the present products was exhausted by the fact of their lawful distribution in Germany. Then the appellant appealed.

Held: 'The appeal is dismissed. The cost of litigation shall be borne by the appellant.

On the grounds stated below:

'1. Article 4.2 in the Paris Convention' for the Protection of Industrial Property provides as follows: (1) Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not. (2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for during the period of priority are independent both as regards the grounds for nullity and forfeiture, and as regards their normal duration. These provisions deny the interdependence of patents and provide that each country's patent is independent as regards its eligibility of protection, transfer, nullity and forfeiture. Namely they provide that the existence of a patent itself is not affected by the nullity, extinction, duration, etc. of any foreign patent. It should be said that the question whether the exercise of a parent by a patent holder is allowed in a certain situation is outside the scope of these provisions.

In addition, the Principle of Territoriality as regards patents means that the existence, transfer, effect, etc. of each country's patent are governed only by that country's law, and the patent is effective only in the territory of that country.

When a patent holder exercises his patent-right in Japan with respect to a Japanese patent, how to appreciate the circumstances where the products which are objects of that right were assigned abroad by patent holders, etc. ...is a matter of interpretation of the Japanese Patent Act. Such a question has nothing to do with the Paris Convention or the Principle of Territoriality, so it is clear that whatever interpretation you may adopt on this point, it does not breach Article 4.2 of the Paris Convention or the Principle of Territoriality.'

'2. A patent holder has an exclusive right to exploit a patented invention (cf. Article 68 of the Patent Act) , and as to product inventions, the acts of use, assignment, and lending of patented articles mean exploitation of patented inventions (cf. Article 2 (3) 1 of the Patent Act). Therefore, when a person who acquired the patented articles from the patent holder or the licensee uses them himself or resells

them to a third party through his occupation, and when the third party who acquired the patented articles from the person stated above, in his occupation, uses, resells, or lends them to another person, those acts apparently come under exploitation of the patented invention and seem to infringe the patent. However, when a patent holder or a licensee assigns patented articles in Japan, it should be said that the patent is exhausted as to those articles for the reason that its purpose is achieved, and that the effect of the patent no longer extends to the acts of use, assignment, and lending of those patented articles.'

'(2)...if the license by a patent holder is necessary whenever the patented articles are assigned, smooth circulation of those articles will be prevented and the interests of the patent holder himself will be harmed....'

'(3) A patent holder can receive a royalty for assignment, including the cost for disclosure of his patented invention, when he assigns the patented articles, so it can be said that the opportunity to be compensated for disclosure of the patented invention is guaranteed and there is no need to grant a patent holder the right to obtain double benefits in the course of distribution of the patented articles assigned by a patent holder or a licensee.'

'3. However, when a Japanese patent holder has assigned patented articles abroad, we cannot argue in the same way as above. Because it cannot always be said that the patent holder has a patent in the same invention in the country where he assigned the patented articles, and even if he had a corresponding patent, it is not appropriate to say that he obtained double benefits in the light of the fact that the Japanese patent is different from the corresponding patent in the country of assignment.'

'4. Let us consider the adjustment between the circulation of articles in international commerce and the right of a patent holder. Considering the current situation under which international economic commerce is developing in tremendously vast areas and at high levels, the free circulation of goods including imports of articles should be maximally respected even when a Japanese dealer imports articles which were sold abroad and puts them into circulation in the Japanese market. Dealings in foreign commerce are made in the general expectation that the assignor transfers all rights to the assignee with respect to the subject of the transaction and the assignee acquires all the rights that the assignor had. Considering the state of international commerce in modern society as described above, even in the case of an assignment by a patent holder of patented articles abroad, it is naturally expected that an assignee or a third party who purchases those articles from the assignee imports them by occupation and uses or resells them by occupation in Japan.

From the foregoing analysis, it is proper to conclude that when a Japanese patent holder or a person who can be regarded as such assigns the patented articles abroad, the patent holder may not exercise his right in Japan as to those articles

against the following persons: the assignee, except when the patent holder agrees with the assignee to exclude Japan from the territories for sale or use as to those articles; a third party who acquires the patented articles from the assignee and further assignees, except when the patent holder makes the above-mentioned agreement with the first assignee and clearly indicates such on the patented articles.

First, ...when the patent holder sells the patented articles abroad without any reservation, it should be interpreted that the patent holder by implication vests the dominant right to those articles in the assignee and further assignees without any limitation derived from the patent-right in Japan. Second, ...the patent holder may reserve the right to exercise its patent right in Japan when it assigns the patented articles abroad. When the patent holder...clearly indicates the above-mentioned agreement with the assignee on the products, further assignees...are able to recognize that the products are subject to such restrictions and to decide by free will whether or not they should purchase the products subject to the restrictions. Third, even when the patented articles are assigned abroad by a subsidiary, affiliated or like entity, who may be identified with the patent holder, it should be interpreted in the same way as the case of an assignment by the patent holder himself. Fourth,...the assignee's reliance on the free circulation should be protected regardless of whether a patent holder has a corresponding patent or not in the country where the patented articles are initially sold.'

'5. In the case before us, ...the appellant himself, as the holder of the present patent, sold the whole products in question in the Federal Republic of Germany. Since the appellant has not alleged or proved in this case that it made an agreement with the assignee to exclude Japan from the territories for sale or use and that it indicated as such on the products in question, the appellant may not claim an injunction or damages regarding the products in question on the basis of the present patent.'

Justice Masao Ohno (presiding)
Justice Itsuo Sonobe
Justice Hideo Chikusa
Justice Yukinobu Ozaki
Justice Shigeru Yamaguchi

Exhibit 13.1

Supplemental Teaching Materials (1)
[Exhibit13-1]

The CONVERSE Trademark Infringement Case

Tokyo District Court Decision 23 June 2009
Intellectual Property High Court Decision 27 April 2010

(Facts and issues involved)

A brief summary of the case is as follows.

Converse, Ltd was a U.S. company engaged in manufacturing and sale of sport goods such as shirts and shoes and owned a trademark ”CONVERSE”. This trademark was well-known not only in U.S. but also all over the world including Japan. In 2001, Converse Ltd. was declared bankrupt and its assents were taken over by a new company called New Convers, Ltd. (hereafter referred to as “New Converse”).

A Japanese trading company, C. Itoh was assigned the trademark CONVERSE in Japan. C. Itoh licensed it to two of its subsidiaries. Under the Japanese trademark law, a trademark can be transferred without transfer of business with it. In Japan, at the time of this law suit, it was only less than 10 years since the trademark CONVERSE was transferred to C. Itoh and this trademark was not associated with C. Itoh and its subsidiaries among the Japanese consumers. The majority of the Japanese population associated the trademark “CONVERSE” with either defunct Converse, Ltd. or New Converse, Ltd. but not with C. Itoh and its group.

A Japanese company, Loyal, Ltd., imported into Japan shoes manufactured by New Converse in U.S. with the trademark CONVERSE and sold them in the Japanese market. C. Itoh and its subsidiaries brought suits against Loyal, Ltd. in the Tokyo District Court and claimed that Loyal, Ltd. infringed the trademark of C. Itoh and its subsidiaries because the trademark CONVERSE has been registered in Japan by C. Itoh. C. Itoh and its subsidiaries sought an injunction to stop Loyal, Ltd. from selling products bearing the trademark CONVERSE in the Japanese market and also a damage award caused by imports of CONVERSE goods into the Japanese market by Loyal, Ltd.

Loyal, Ltd. argued that a parallel importation of genuine trademarked goods is regarded as not infringing a domestic trademark under the Parker and Fred Perry doctrines and Loyal, Ltd. is entitled to import goods bearing the trademark CONVERSE.

Loyal, Ltd. further claimed that the conduct of C. Itoh and its subsidiaries is an illegal interference of business of Loyal, Ltd. and constituted an infringement of the Antimonopoly Law.

(Decisions)

The Tokyo District Court and Intellectual Property High Court held that the parallel importation of CONVERSE goods by Loyal, Ltd. constitutes an infringement of the Japanese trademark law and C. Itoh and its subsidiaries are entitled to an injunctive relief and damage award. The decisions are summarized below.

Parallel importation of genuine trademarked goods is held not to infringe a domestic trademark if the following conditions are satisfied: (a) the trademark in question was duly affixed in a foreign country by the trademark owner or its licensee; (b) The trademark owner in the foreign country and the trademark owner in Japan are either the same person or are economically or legally a single entity; and (c) there is no substantial difference in quality of goods in question because the domestic trademark owner has control over the quality. The functions of a trademark are to identify the origin of goods and to guarantee the quality of goods and, as long as the above conditions are satisfied, a parallel importation of genuine trademarked goods does not cause harm to those functions, the interest of consumers is protected and business reputation of users of such a trademark is preserved.

There is no mutual stock-ownership and interlocking directorate between C. Itoh (and its subsidiaries) and New Converse, Ltd. Nor is there any indication that those two companies are in substance combined together. Therefore, C. Itoh and New Converse are not the same person nor do they constitute a single economic entity. There is no evidence to show that C. Itoh can exercise quality control over shoes manufactured by New Converse.

Loyal, Ltd. argues that the trademark CONVERSE is a world famous trademark and is widely associated with products of Converse, Ltd. or New Converse. Since C. Itoh and its subsidiaries have not established a reputation with respect to this trademark in Japan, a parallel importation of products bearing the trademark CONVERSE does not constitute an infringement of this trademark in Japan. The courts reply that the identification of the origin of goods simply means that products bearing the same trademark come from the same origin and, in this case, the origin indicated by the trademark should be regarded as C. Itoh which owns the trademark in Japan. As mentioned before, there is no relationship between C. Itoh and Converse,

Ltd. or New Converse, Ltd. in terms of stock-ownership, interlocking directorate or in any other way and, therefore, C. Itoh and New Converse cannot be a single economic entity. For this reason, to import products bearing the trademark CONVERSE without authorization of C. Itoh constitutes an infringement of the trademark owned by C. Itoh in Japan.

Even if, as argued by Loyal, Ltd., the trademark CONVERSE is a world famous trademark and the majority of consumers associate this trademark with New Converse, C. Itoh is entitled to protection under the Trademark Law in Japan as the owner of the trademark in Japan, because the use of trademark is not a requisite for registering the trademark (the registration principle) and the owner of a trademark which has registered it can claim infringement of it against a party which uses it without authorization.

(Legal issues to be discussed)

(a) Is this holding consistent with the rulings of the Parker and Fred Perry Cases?
(b) Under this ruling, are consumers protected?
(c) Should this decision be reversed? If reversed, what is the significance of trademark registration?
(d) If this decision is reversed and the parallel importation of products bearing the trademark CONVERSE is held not to infringe the trademark owned and registered by C. Itoh in Japan, does the conduct of C. Itoh and its subsidiaries to block the parallel importation constitute a violation of the Antimonopoly Law?

Supplemental Teaching Materials (2)

[Exhibit 13-2]

CASES AND ISSUES IN JAPANESE PRIVATE INTERNATIONAL LAW

THE APPLICABLE LAW IN PATENT INFRINGEMENT

Mari Nagata*

Introduction

The issue of the law applicable to intellectual property rights has been extensively debated in Japan and worldwide. One particular case, *Card Reader*, is the first and only Supreme Court case to date that deals with the law applicable to patent infringement. Although this case has been widely criticized by legal scholars and practitioners, many lower courts now follow the Supreme Court's guidelines. At the time of the Supreme Court's decision on *Card Reader*, the applicable Japanese law on conflict of laws was the Act on the Application of Laws (hereinafter, *Horei*). *Horei* did not provide for the applicable law to intellectual property right. Although *Horei* was amended on 2008, the revised act, entitled the Act on General Rules for Application of Laws (hereinafter, *Tsusokuho*), also did not provide for the applicable law to intellectual property rights. Therefore, *Card Reader* retains its significance as a leading case.[1]

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[1] In his article, Professor Kidana provides an overview of matters pertaining to private international law and intellectual property. It also includes an analysis of the key case. See, Shoichi Kidana, "Private International Law on Intellectual Property," *Japanese Yearbook of International Law*, Vol. 52 (2009), pp. 454-481.

Japanese Yearbook of International Law
Vol. 55 (2012), pp. 496-510

I. Key Case

The facts of this case are as follows:[2]

X (Plaintiff, Intermediate Appellant, Final Appellant) held a United States patent for an invention entitled "FM signal demodulation equipment." X asserted that the products that Y (Defendant, Intermediate Appellee, Final Appellee) manufactured in Japan, exported to Y's United States subsidiary Z, and sold by Z in the United States, infringed X's United States patent, and that Y's acts of exporting the products actively induced Z's acts of direct infringement of X's patent. X filed this suit against Y in Japan. X demanded the following, pursuant to Article 271(b) of the United States Patent Law: (a) an injunction against Y's manufacture of the products in Japan for the purpose of export to the United States and such export; (b) the destruction of products in Y's possession in Japan, and (c) tortious and other damages.[3] The court of first instance (Tokyo District Court, Judgment, April 22, 1999, H.J. (1691) 131 [2000]) and the lower court (Tokyo High Court, Judgment, January 27, 2000, H.J. (1711) 131 [2000]) dismissed X's claims. X then filed a final appeal.

The Supreme Court held as follows:

(1) Regarding (a) and (b) above:

1.

1) The said action for injunction and the said action for destruction of the infringing goods are actions based on a private individual's property rights, both parties in this case are Japanese and a Japanese corporation with a residential address or domicile in Japan, and the actions are concerned with acts occurring in Japan. However, the actions involve a conflict of laws in that these are actions by way of holding a right bestowed under the U.S. Patent Act, so that it is necessary to decide on the governing law.

The principle of territoriality in relation to patent rights means that a patent right registered with each country is to be governed by the laws of the relevant country with regard to issuance, transfer, validity and the like thereof and such patent right can come into force only within the territory

[2] Supreme Court, Judgment, September 26, 2002, 56 Minshu (7) 1551 [2002]. The full English translation of this decision is published on the website of the Supreme Court of Japan, *available at* <http://www.courts.go.jp/english/judgments/text/2002.9.26-2000.-Ju-.No..580.html>.

[3] It should be noted that the United States patent in this case was based on a product invented by X while he worked as a technical manager at non-party Company A. Y's manufacture of the products was due to Y's succession to Company A's business after Company A's bankruptcy. Y sued X, demanding transfer of X's patent in the United States to Y and final and conclusive judgment had been entered against Y (Tokyo High Court, Judgment, July 20, 1994, 26 Chiteki Saishu (2), 717 [1995]).

of the relevant country (see, Supreme Court, Third Petty Bench, Judgment, July 1, 1997, 51 Minshu (6) 2299 [1997]). In other words, each country has the discretion to stipulate under national law what procedures are to be followed for granting an invention with validity based on its industrial policy, and in the case of Japan, a Japanese patent is held valid only within the territory of Japan. However, as this fact does not make it unnecessary to decide on the governing law as required under *Horei* in general, the determination the court below arrived at as mentioned in preceding 1(1) is not found appropriate.

The demand for an injunction and destruction based on a United States patent differs in its purport and characteristics from a demand based on tort, the purpose of which is to compensate the victim for his past losses from the viewpoint of justice and fairness. It is based on the exclusive monopolistic effect of the United States patent. The legal nature of the demand for an injunction and destruction based on a United States patent should therefore be ruled to be the effectiveness of the patent.

2.

With regard to the law governing the effect of the patent, there are no direct provisions in legislation such as *Horei*. Therefore, the proper interpretation, according to logic, is that the governing law should be that of the country where the patent is registered, the country to which the patent is most closely connected. Indeed, this is because (i) a patent is recognized as a right by undergoing application and registration processes in each country; (ii) many countries adopt the territoriality principle with regard to patents; and (iii) since the effect of a patent is acknowledged only within the territory of the relevant country, in light of the fact that it is the country of registration that is requested to protect the patent, the proper interpretation is that the country with the closest connection with the patent is the country where the patent was registered.

Therefore [...] the governing law for the claim for an injunction and destruction in this case, is the law of the United States where the United States patent was registered.

3.

Article 271(b) and related provisions of the United States Patent Law prescribe that, as long as the directly infringing acts occur in the United States, and, even if active inducement occurs outside United States territory, it is possible to order remedies such as an injunction or the destruction of the infringing goods. However, such an order would:

[...] produce substantially the same result as applying the effect of the United States patent in Japan, a country outside its territory, and that would be contrary to the territoriality principle adopted by Japan. Moreover, since

there is no treaty between Japan and the United States prescribing domestic recognition of the effect of the other country's patents in each country, it would be contrary to the basic principles of patent law policy to order an injunction against acts in Japan and the destruction of articles in Japan as a result of the application of the United States Patent Law to active inducement of a United States patent infringement that took place in Japan, as in this case.

Therefore, "the proper interpretation" is to allow that demands (a) and (b) above under the United States Patent Law would be "contrary to Japan's public policy prescribed in Article 33 of *Horei*." In conclusion, we are able to uphold the decision of the lower court that dismissed the demands (a) and (b) above.

(2) Regarding (c) above:

4.

The claim for damages on the grounds of infringement of patent rights is not an issue peculiar to patents, but part of civil relief from the infringement of property rights. Its legal nature is that of tort, and the governing law should be decided in accordance with Article 11(1) of *Horei*.

5.

With regard to the claim for damages in this case, "the place where the events causing the claims occurred" under Article 11(1) of *Horei* should be interpreted as the United States, where the acts directly infringing the United States patent occurred, and the resultant infringement of rights arose, and the governing law should be United States law. Indeed this is because, (i) we can say that if Y's acts in Japan had been acts in the United States actively inducing the United States patent infringement in this case, the resultant infringement of rights would have arisen in the United States; and (ii) if we interpret the governing law to be that of the United States, so long as Y plans to have its subsidiary import and sell into the United States, this is also something that was not unforeseeable for Y.

6.

There is room to find Y liable for damages in accordance with the United States Patent Law. However, under Article 11(2) of *Horei*, liability must also be affirmed under Japanese law.

Adopting the territoriality principle, Japanese law has no provision allowing the effect of the patent law to extend to acts of active inducement outside its own territory, as Article 271(b) of the United States Patent Law does, and so long as there is no legislation or a treaty recognizing the same, we cannot conclude that the acts of active inducement of patent in-

fringement outside the territory of the country of registration, where the effect of the patent does not reach, were unlawful, and possessed of the elements necessary to establish a tort.

Therefore, in conclusion, we approve the decision of the lower court, which dismissed the demand in (c) above.[4]

II. Background

1. Territoriality Principle

(1) Court cases

As mentioned above, there is no specific provision regarding the law applicable to intellectual properties, including patent right, in Japan. However, with regard to patent right, the so-called "Territoriality Principle" has been admitted in academic writings and court cases.[5] In *BBS*,[6] which dealt with the issue of the admissibility of parallel import of patented products, the Supreme Court admitted the Territoriality Principle, based on Article 4-2 of the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967 (hereinafter, the Paris Convention). The Supreme Court, in its ruling on *BBS* stated that "[the] territorial principle means that as far as a patent is concerned, emergence, transfer, effect etc. of the patents of each country are governed by their respective national laws, and the effect of patents is acknowledged only within the country," in *obiter dictum*. This finding by the Supreme Court has been followed by the Supreme Court in the key case.

(2) Doctrine

Although the Territoriality Principle is admitted in general in doctrine, the meaning, extent of application, and whether this principle is the principle of conflict of laws is debatable. No clear answer is apparent. Since exploration of the significance of the Territoriality Principle in general is beyond the scope of this case note, this paper will only refer to those arguments related to the law applicable to patent right.

In reference to the ground for admitting the Territoriality Principle in the field of patent right, there are several positions: (i) the opinion which sees the ground in Art. 4bis of the Paris Convention, which provides the principle of independence of patents;[7] (ii) the opinion which is based in Art. 2 of the Paris Convention, which provides most favored nation treatment;[8] (iii) the opinion which finds the ground in a tacit premise of Paris Convention;[9] (iv) the opinion which is based on Art. 10 of *Horei* (or Art. 13 of *Tsusokuho*), which provides *lex rei sitae*;[10] and (v) the opinion which is reasoned from the principle of balancing interests.[11, 12]

In any case, it is commonly understood that the Territoriality Principle is polysemous. We could not derive just one principle regulating substantive law from this term. We could also derive an another kind of principle regulating conflict of laws. Moreover, consideration of this principle as a principle of conflict of laws causes discordance in the academy. Some legal scholars explain the Territoriality Principle as it was referred to in the key case by the Supreme Court; others explain it as a patent right which is to be governed by the laws of the country for which protection is sought (*lex protectionis*) with regard to issuance, transfer, validity, etc.[13]

The Doctrine diverges to the extent that a principle regulating substantive law plays a role, and to the extent that a principle regulating choice of law extends.[14] One extreme position only admits the Territoriality Principle in the context of rules of substantive laws. The other extreme position admits this principle only in the context of rules of choice of law. Some scholars take the middle position between

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[4] Judge Machida and Judge Ijima have expressed concurring opinions on this judgment. Judge Fujii has expressed a dissenting opinion.

[5] See, *e.g.*, Naoki Koizumi, "Iwayuru Zokuti Syugi ni tuite" [Territorial Principle and Intellectual Property], *Jochi Hogaku Ronsyu* [Sophia Law Review], Vol. 45, No. 1 (2001), p. 1.

[6] Supreme Court, Judgment, July 1, 1997, 51 Minshu (6) 2299 [1997], translated in English at *Japanese Annual of International Law*, Vol. 41 (1998), p. 110.

[7] Kazunori Ishiguro, "Chiteki Zaisanken to Zokuti Syugi" [Intellectual Property Right and Territoriality Principle], in Hidetaka Aizawa, Tetsuya Ohbuchi, Naoki Koizumi and Yoshiyuki Tamura eds., *Chiteki Zaisanho no Riron to Gendaiteki Kadai* [Theory and Problems on Intellectual Property] (2005), p. 517.

[8] Saburo Kuwata, "Tokkyo Seihin no Heiko Yunyu Mondai" [Some Problems on Parallel Import of Patented Goods], *A.I.P.P.I*, Vol. 40, No. 6 (1995), p. 362.

[9] Koizumi, *supra* note 5, p. 8.

[10] Akira Saito, "Heiko Yunyu ni yoru Tokkyoken Shingai" [Patent Infringement by Parallel Import], in *Chiteki Zaisan no Houteki Hogo* [The Protection of Intellectual Property] (1997), p. 100.

[11] Yoshiyuki Tamura, *Chitekizaisanho* [Intellectual Property] (5th ed., 2010), p. 464.

[12] Professor Yokomizo examined the historical ground for the Territoriality Principle and concluded that there is no theoretical reasoning for it. See, Dai Yokomizo, "Chitekizaisanho ni okeru Zokuti Syugi no Gensokuteisyokuho jo no Ichizuke wo Tyusin ni" [Territoriality Principle in the Field of Intellectual Property], *Chitekizaisan Hoseisakugaku Kenkyu* [Intellectual Property Law and Policy Journal], No. 2 (2004), p. 23.

[13] Shigeki Chaen, "Tokkyoken Shingai no Junkyoho" [Applicable Law in Patent Infringement], *Kokusai Shiho Nenpo* [Japanese Yearbook of Private International Law], No. 6 (2004), p. 40.

[14] For details, see, Yokomizo, *supra* note 12, pp. 17-42.

these two extremes. The prevailing opinion takes the middle way when it addresses the issue of the effect of patent right, and then adapts the substantive Territoriality Principle to it. In the meantime, when it addresses the issue of the applicable law to patent right, the Territoriality Principle as choice of law rule emerges. For this prevailing opinion, *lex protectionis* is an incarnation of the Territoriality Principle as a choice of law rule.[15]

2. The Law Applicable to Injunction of Patent Infringement Acts

(1) Court cases

The key case is the only case rendered by the Supreme Court of Japan concerning the applicable law to injunction of patent infringement. Even in lower court cases, no cases that deal with this issue appear prior to the key case.[16]

(2) Doctrine

Some legal scholars deny the necessity to decide an applicable law to patent right.[17] Two kinds of reasoning support this view. On one hand, some assert that an injunction claim based upon Patent Infringement is qualified as a matter of public law; patent right is created through registration in one country and has close relations with an industrial policy of that country.[18] On the other hand, some scholars take the same ground as the Tokyo High Court in its judgment in the key case.[19] The High Court ruled that the Patent Act of one country could not have a binding effect on other country's territory. Therefore, a foreign Patent Act cannot be invoked before a Japanese court.[20]

A contrasting opinion admits the necessity of deciding a law applicable to this kind of injunction claim since an injunction claim is based on the property of a private person, even if this property is a patent right.[21] However, it can be asserted

[15] Chaen, *supra* note 13, p. 40.

[16] Even after this case, only one other court case has been rendered concerning the applicable law to injunction claim based upon patent infringement. See, *Coral Sand Case*, Tokyo District Court, Judgment, October 16, 2003, H.J. (1874) 23, H.T. (1151) 109.

[17] Masato Dogauchi, Case Note, *Jurisuto* [Jurist], No. 1246 (2003), p. 280; Dai Yokomizo, "Denshi Shotorihiki ni kansuru Teisyokuho jo no Syomondai" [Some Problems on Private International Law in the Field of E-Commerce], *Minshobo Zasshi* [Civil and Commercial Law Journal], Vol. 124, No. 2 (2001), p. 173.

[18] Dogauchi, *supra* note 17, p. 279. In addition, it points out that penal provisions, which aim at Patent Infringement, are included in the Patent Act as well.

[19] Tokyo High Court, Judgment, January 27, 2000, 56.Minshu (7) 1600 [2002].

[20] Yokomizo, *supra* note 17, p. 173.

[21] See, *e.g.*, Tomoko Takabe, Case Note, *Hoso Jiho* [Lawyer's Times], Vol. 56, No. 9 (2004), p. 2273.

that qualification of an injunction claim and a damage claim of a patent infringement act should be unified.[22] Injunction and damage claims are of the same character as relief from patent infringement. Therefore, these claims should be qualified in the same manner.

Although the latter position has a good deal of academic support, scholars are divided on the issue of qualification of these claims. Some scholars would qualify an injunction and/or damage claim based upon the patent as the effect of patent.[23] However, the prevailing opinion asserts that these claims are of tort, because they are the relief from an unlawful act, as provided in Art. 17 of *Tsusokuho*.[24] Among those who hold this opinion, disagreement continues on how to decide the place of tort. Some insist that the place of tort should be interpreted as being the place the patent right in question was registered[25] because the effect of patent right is limited in the country of registration and no one could infringe this patent right outside this country.[26] Others insist that the place of tort is the place of the act of infringement[27] since the Patent Act regulates production and use of patent to re-

[22] Shoichi Kidana, Case Note, *Minshobo Zasshi* [Civil and Commercial Law Journal], Vol. 129, No. 1 (2003), p. 112; Satoshi Watanabe, Case Note, *Shiho Hanrei Rimakusu* [Remarks on Cases in Private Affairs], Vol. 28 (2004), p. 157; Yuko Nishitani, "Intellectual Property in Japanese Private International Law," *Japanese Annual of International Law*, No. 48 (2005), p. 103.

[23] Nobuo Monya, "Chiteki Zaisanken no Kokusaiteki Hogo" [International Protection of Intellectual Property Right], in Takao Sawaki and Junichi Akiba eds., *Kokusai Shiho no Soten* [Some Issues on Private International Law] (new ed., 1996), p. 25; Jun Yokoyama, *Kokusai Shiho* [Private International Law] (2012), p. 218.

[24] Article 17 of *Tsusokuho* provides the following: "The formation and effect of a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred; provided, however, that if the occurrence of the result at said place was ordinarily unforeseeable, the law of the place where the wrongful act was committed shall govern."

[25] Watanabe, *supra* note 22, p. 157; Kidana, *supra* note 22, p. 118. Although professor Kidana claims that *lex loci protectionis* should be the applicable law, the meaning of *lex loci protectionis* here is the place where the patent right was registered. (In this key case, that place would be the USA.)

[26] Although professor Nishitani takes the position that the law of the country of registration should be applied, she insists on the special rule for patent infringement and not using Art. 17 of *Tsusokuho*. See, Yuko Nishitani, Case Note, *Kokusai Shiho Hanrei Hyakusen* [Collection of Selected Cases on Private International Law] (rev. ed., 2009), p. 75; Yuko Nishitani, "17jou" [Article 17 of *Tsusokuho*], in Yoshiaki Sakurada and Masato Dogauchi eds., *Tyusyaku Kokusai Shiho* [Commentary on Private International Law], Vol. 1 (2011), pp. 455-456.

[27] Chaen, *supra* note 13, p. 47. Professor Chaen uses *lex loci protectionis* as well but his meaning is that the place where the real act has occurred. (In the key case, that place would be Japan.)

alize the industrial policy of the state. Therefore, that act is the key factor, not the registration.[28]

3. The Law Applicable to a Damage Claim Arising Out of Patent Infringement

(1) Court case

This case is the second of two cases that dealt with a damage claim arising out of foreign patent infringement in Japan. The first case to address this issue was *Manchurian Patent*.[29] In *Manchurian Patent*, the claimant, a Japanese company held a patent right registered in Manchuria. The company claimed that the defendant, a Japanese company, infringed its patent right through importation and distribution of products in Manchuria. They also claimed that these products were manufactured by the defendant in Japan on the basis of the claimant's Manchurian patent right. The Japanese company claimed that the defendant should pay for damage caused by its infringement of patent right. Tokyo District Court dismissed the claim on the ground that there is no room for admitting a damage claim that is based upon a foreign patent right. The Tokyo District Court stated that, based on application of the Territoriality Principle: (1) only a Japanese patent right is valid in Japan; and (2) the infringement of foreign patent right in a foreign country "do[es] not constitute a tort under Japanese Law, [because] no claim under the foreign law may be made for damages or any other remedies" (Art. 11(2) of *Horei*).[30]

(2) Doctrine

Another opinion on this issue excludes the issue of conflict of laws.[31] However, the prevailing opinion states that a decision on deciding applicable law is required. This prevailing opinion states that, although there are several views on qualification of damage claims, the most supported one is the view that qualifies the damage claim as tort, and considers the place of registration as a place of tort as already described in 2. (2).[32]

[28] *Ibid.*

[29] Tokyo District Court, Judgment, June 12, 1953, 4 Kakyu Minshu (6) 847.

[30] Some academics point out that Tokyo District Court's understanding of Art. 11(2) of *Horei* in *Manchurian Patent* is succeeded by the Supreme Court's judgment in the key case. See, Watanabe, *supra* note 22, p. 156.

[31] Monya, *supra* note 23, p. 25; Yokoyama, *supra* note 23, p. 218.

[32] See, *supra* note 26.

III. Analysis

1. Territoriality Principle

As noted above, the Territoriality Principle is an ambiguous term. The ambiguity of this term is particularly visible when we view the results in the key case. Although the Tokyo High Court admitted the Territoriality Principle with respect to a patent right, it took a different position from the Supreme Court in *BBS* because it regarded this principle to be the same as in the field of public law. According to the Tokyo High Court:

> [...] as to a patent right, the internationally admitted Territoriality Principle should be applied. Even if the issue is concerning about the act infringing foreign patent in Japan, it is not possible to claim injunction nor damage based upon foreign patent in front of Japanese court unless there is a special provision in the law or convention. Therefore, there is no need to consider the matter regarding applicable law to the injunction or damage claim based upon foreign patent.

However, the Supreme Court did not accept this understanding of the Territoriality Principle. Instead, it followed the precedent decision rendered in *BBS*. On that basis, the Supreme Court decided that the Territoriality Principle did not exclude the necessity to decide on the applicable law. The definition of the Territoriality Principle made by the Supreme Court in the key case could be understood as follows: (1) the part where it decides that a "patent right can come into force only within the territory of the relevant country" is considered to be a principle concerning substantive law; and (2) the part where it decides that "a patent right registered with each country is to be governed by the laws of the relevant country with regard to issuance, transfer, validity and the like thereof" is considered to be a principle concerning the conflict of laws.[33] The Supreme Court itself uses this term in various ways.

When this term is understood to mean that the validity of patent rights is limited within the country of registration, no objections are raised. However, from my point of view, at least in relation to an injunction claim and a damage claim arisen out of patent right, there is no need to go any deeper into the matter. As noted below, these claims are qualified as a sort of remedy for an unlawful act, and the Territoriality Principle is not a conflict of laws norm in this regard.[34]

[33] Takabe, *supra* note 21, p. 2269.

[34] However, it is important to note that it is possible to admit that the Territoriality Principle plays a role as a conflict of laws norm regarding the effect or validity of patent right.

Moreover, the ambiguity of this term could hinder the true understanding of the choice of law issue,[35] because the Supreme Court erred in its judgment and refused to apply the US Patent Act on the basis of *ordre public*. As noted below, this part of the key case judgment has been widely criticized by legal scholars. It could be shown that the Supreme Court's train of thought took the following path: The effect of patent right should be regulated by the country of its registration because of the Territoriality Principle. In the meantime, at least in Japan, the Territory Principle restricted the effect of the Patent Act (not patent right) within the country. Therefore, it is against Japanese *ordre public* to apply the US Patent Act and uphold an injunction claim in Japan. It is clear that the first view of the Territoriality Principle is a choice of law rule and the second one is substantive. The Supreme Court mixed two kinds of principles. Consequently, it derived an incorrect result from a hybrid principle.

Limiting the effect of a right within one country is not equivalent to limiting the effect of law concerning the right within that country. Even if we must admit the fact that the Territoriality Principle contains a rule restricting the effect of the Patent Act within one country, this fact does not imply that the application of this law in a foreign country is prohibited. Furthermore, with reference to the key case, the application of this law in a foreign country does not constitute admission of any extraterritorial application. Thus, in the key case, the Supreme Court should not have used *ordre public* based upon the Territoriality Principle in order to deny the application of the US Patent Act.

2. Applicable Law to Injunction Claim and Damage Claim Based Upon a Patent Right

In its judgment in the previous instance of the key case, the Tokyo High Court divided these two issues (as did the Supreme Court). It denied the right to decide the governing law on an injunction of patent infringement. It did so because an injunction claim based upon foreign patent rights is not admissible in a Japanese court without convention or law providing otherwise. The Tokyo High Court based these decisions on the Territoriality Principle.

However, although the Supreme Court took the same position as Tokyo High Court regarding the qualification of these two claims, it decided that: (1) it is necessary to decide which law should be applied; (2) the nature of the claim of injunction is qualified as the effect of the patent right; (3) there is no conflict of laws rule providing the effect of a patent right in Japanese legislation nor in convention; and (4) the place which has the closest connection with a patent right is the place of registration of the patent right. According to the Supreme Court, there are three

[35] Watanabe, *supra* note 22, p. 157.

reasons for this conclusion: (1) a patent right could be admitted as a right only after its registration; (2) the Territoriality Principle is admitted by many countries and, with this principle, the effect of a patent right is limited within the territory of the country of registration; and (3) based on the above two reasons, the country where a protection of patent right is sought is the country of registration.

With regard to the claim on injunction, it is notable that, although Supreme Court admitted the possibility of an injunction claim based upon the US Patent Act, it finally denied this claim because it is contrary to Japanese *ordre public* to admit this injunction based upon Art. 33 of *Horei* (Art. 42 of *Tsusokuho*[36]). According to the Supreme Court, admission of this kind of claim is equivalent to acceptance of the extraterritorial application of the US Patent Act, and it is against the Territoriality Principle, which is a fundamental policy of the Japanese Patent Act.

The court, throughout three instances in this key case, kept its stance to qualify a damage claim arising out of patent infringement as a tort. However, the Supreme Court took a different position from the lower courts by localizing the place of tort to the USA.[37] Although the Supreme Court paid significant attention to the fact that infringement of patent right occurred in the USA, the lower courts' paid a significant attention to the fact that the manufacture and distribution of products took place in Japan.

Scholars with varying viewpoints have sharply criticized the section of the Doctrine that addresses the applicable law to injunction claim of the key case judgment.

One critic finds fault with the Supreme Court decision on the ground that it examined the applicable law to Patent Infringement because the critic feels that there is no need for the choice of law issues in injunction claims[38] that arise out of patent right. From these opinions, the Supreme Court's decision should be interpreted as Supreme Court characterized regulations concerning an injunction claim as mandatory rules and considered the possibility of the application of foreign mandatory rules.[39]

Another criticism offered is an objection to the Supreme Court's qualification of

[36] Art. 42 of *Tsusokuho* provides as follows: "In cases where a foreign law shall govern, if the application of those provisions of the foreign law is against public policy, those provisions shall not apply." (Art. 33 of *Horei* was not revised.)

[37] Art. 11(1) of *Horei* provided as follows: "The formation and effect of claims arising from a tort, a *negotiorum gestio* or unjust enrichment shall be governed by the law of the place where the harmful event occurred." Judge Machida took the same position as the lower Courts in his concurring opinion.

[38] Dogauchi, *supra* note 17, p. 280.

[39] Dai Yokomizo, Case Note, *Hogaku Kyokai Zasshi* [Journal of the Jurisprudence Association], Vol. 120 (2003), p. 2310, posits that only this interpretation could explain why the Supreme Court denied to apply US patent law on the ground of *ordre public*.

an injunction claim based upon a patent right. This criticism is offered by scholars who admit the necessity of deciding a law applicable to this kind of injunction claim. However, as noted above, they assert that qualification of injunction and damage claims of a patent infringement act should be unified.[40] In the opinion, the key case is criticized because it qualifies injunction and damage claims differently.[41]

Furthermore, almost all scholars criticized the Supreme Court's interpretation of *ordre public* and its denial of injunction on that basis because, according to the understanding of conflict of laws rule today, the conflict of laws norm concerning territorial scope is not included in the application of a foreign law. This interpretation rules out the possibility of consideration of the spatial territorial scope of a foreign law as the object of public policy.[42]

As to the applicable law to a damage claim based upon a patent right, the key case is supported by prevailing opinion.[43] However the most contentious point is that the Supreme Court denied this damage claim based upon Art. 11(2) of *Horei* (Art. 22(1) of *Tsusokuho*),[44] which provides "double actionability." Many scholars criticized this decision, because this article demands to consider whether the act at hand should be regarded as tort when the same kind of right is violated.[45] This provision aims at the unlawfulness of the act itself. Therefore, the territorial scope of the law is outside its scope.[46] Because of this, most scholars concluded that this

[40] Kidana, *supra* note 22, p. 112; Watanabe, *supra* note 22, p. 157.

[41] It could be said that the reason that the Supreme Court qualified an injunction claim and damage claim separately may be based upon the fact that an injunction claim arises from Art. 100(1) of the Patent Act and a damage claim is founded upon Art. 719 of the Civil Code in Japan. Scholars who favor unified qualification have criticized this way of thinking as being greatly influenced by qualification in domestic substantive law. This is not compatible with prevailing opinion concerning qualification in private international law, which requires that qualification in conflict of laws should be done independently and should not be influenced by national substantive law. See, *e.g.*, Yuko Nishitani, Case Note, *supra* note 26, pp. 74-75; Kazunori Ishiguro, Case Note, *Tokkyo Hanrei Hyakusen* [Collection of Selected Cases on Patent Rights] (2004), p. 215.

[42] Yokomizo, Case Note, *supra* note 39, pp. 2308-2309.

[43] See, *e.g.*, Chaen, *supra* note 13, pp. 49-50; Dogauchi, *supra* note 17, p. 280.

[44] Art. 22(1) of *Tsusokuho* provides as follows:
"In the case where a tort shall be governed by a foreign law, if facts to which the foreign law should be applied do not constitute a tort under Japanese law, no claim under the foreign law may be made for damages or any other remedies."
This provision is the same in Art. 11(2) of *Horei*.

[45] Kidana, *supra* note 22, p. 122. Judge Fujii took the same position as this opinion in his dissenting opinion.

[46] Yokomizo, *supra* note 39, p. 2315.

damage claim was permissible,[47] at least with regard to Art. 22 of *Tsusokuho*.

I do not agree with the opinion that qualifies an injunction claim and/or damage claim as a matter of public law and excludes the choice of law issue. First, if granting a patent right by a country is characterized as a public law matter, it does not hold that remedies of this right should be public law matters as well.[48] Second, evaluation of the act of possible infringement of a foreign patent right as tort by the Japanese Court cannot be inconsistent with the fact that the effect of foreign patent right is confined to the country of registration. Theoretically, that patent right could not be infringed upon in other countries. In this regard, the Supreme Court's decision was affirmed.

However, the qualification made by the Supreme Court is untenable. Injunction claims and damage claims should be qualified in concert as tort. When a person seeks remedy from an unlawful act, there is no difference whether his or her claim is based upon a patent or other right, such as a personal right, or whether he or she pursues an injunction or compensation.[49] It should not matter which legal instrument provides which remedy.[50]

When an injunction claim and damage claim are qualified as tort, the problem of which law should be applied comes to the foreground. According to Art. 17 of *Tsusokuho*, "the law of the place where the result of the wrongful act occurred" should be the first law applied. If the letter of the law is to be obeyed in the key case, the place of the result of the wrongful act could not be a country other than USA because the result of patent infringement only happens in the country where the patent right belongs. In other words, the place of the result of wrongful act is the country where the patent is registered. This holds because the Territoriality Principle confines the patent right's effect within the country of registration. Therefore, in the key case, the applicable law to injunction and damage claims should be the law of the USA, as the country of registration.[51] However, it is important to consider the fact that the defendant holds a Japanese patent right to the same invention. There is still room to deny the injunction claim on the basis of *ordre public*, because the defendant's manufacture and distribution of the products could be presented as legitimate "working" of an invention.[52]

[47] Watanabe, *supra* note 22, p. 157.

[48] *Ibid.*

[49] Nishitani, *supra* note 26 (Case Note), p. 75.

[50] Watanabe, *supra* note 22, p. 157; Nishitani, *supra* note 26 (Case Note), p. 75.

[51] Nishitani, *ibid.*

[52] Professor Yokomizo criticizes this view by indicating that this rule is not totally independent from the plaintiff's claim, and that if there are plural countries whose registered patent is at issue, how to choose one country to determine the applicable law. See, Dai Yokomizo, "Intellectual Property and Conflict of Laws: Between State Policies and Private

Finally, when injunction and damage claims are qualified based upon a patent infringement, a question arises: "Should Article 21 of *Tsusokuho* be applied to these claims?"[53] In my point of view, it is permissible for the parties to choose an applicable law to the damage and/or injunction claim based upon the patent infringement. However, there is a possibility that both parties could choose the law of the country other than the registered country (in the key case, the USA) or other than a country where the infringing acts occur (in the key case, Japan). If both parties choose the law of the other country, then there would be no possibility of remedy. I think that both parties enjoy party autonomy at their own risk. If they exercise their right to choose an applicable law in a way that prevents a remedy, then they should accept the outcome of their choice.

Conclusion

The Supreme Court's decision in *Card Reader* is exceedingly controversial, and it has been widely criticized. Activation of the Territoriality Principal has the potential to trigger disputes. After the Supreme Court handed down its decision in this case, many scholars tried to clarify the ambiguity of the Territoriality Principle. Although the polysemy of the Territoriality Principle has been noted in cases prior to *Card Reader*, the key case thrusts the materiality of the Territoriality Principle directly in our view. More time is needed to extract the true meaning of the Territoriality Principle and its real function with regard to the conflict of laws.

Interests," *A.I.P.P.I*, Vol. 35, No. 3 (2010), p. 122. For the second problem, in my point of view, if the act of a defendant is alleged to have infringed on plural patents in several countries, we have to admit mosaic doctrine, which divides one act into several torts according to the registered countries.

[53] Professor Nishitani expressly excludes this question by not characterizing these claims as tort. See, Nishitani, *supra* note 26 (Commentary), p. 455.

IMPROPER APPLICATION OF FOREIGN LAWS AND FINAL APPEAL TO THE SUPREME COURT — THE SUPREME COURT JUDGMENT ON MARCH 18, 2008

Keisuke Takeshita*

Introduction

This paper addresses whether an improper application of foreign laws constitutes a ground for a final appeal to the Supreme Court.[1] Here, "improper application of foreign laws" means that judges[2] have misinterpreted foreign laws and wrongly applied them.[3] In Japan, the Supreme Court may accept a case "in which the

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[1] In Japan, a high court can also be the court of third and final instance when a summary court (as the court of first instance) and a district court (as the court of second instance) have made judgments. The requirements for the final appeal to a high court are different from the requirements for the final appeal to the Supreme Court (See, Article 312(1) of Minji Sosho Ho [Code of Civil Procedure] (Act No. 109 of June 26, 1996) [hereinafter referred to as the CCP 1996]). In this paper, I will analyze mainly the possibility of a final appeal to the Supreme Court, which was dealt with in the Key Case. Regarding the possibility of a final appeal to a high court, see III-1(4).

[2] In Japan, the thought prevails that judges are bound to ascertain the contents of foreign laws under their authority-at least theoretically-regardless of the proof offered by parties (*cf.* Ryoich Yamada, *Kokusai-shibo* [Private International Law] (3rd ed., 2003), p. 131). Hence, it is said that parties cannot be responsible for the improper application of foreign laws.

[3] The concept of "improper application of foreign laws" may include an improper application of the private international law of the forum country as a result of which judges wrongly apply the laws of a country that should not be applied according to private international law. For example, see J. E. de Becker, *International Private Law in Japan*

Japanese Yearbook of International Law
Vol. 55 (2012), pp. 511-527

Exhibit 14

Enforcement of Foreign Judgment — Judgment by a State Court in California — Compensatory and Punitive Damages — Enforcement of Punitive Damage Awards Refused Because of Contrariety to Public Policy in Japan

Supreme Court Judgment, 11 July 1997; 51 Minshu (6) 2573 [1997]

Northcon I , Oregon Partnership, v. Mansei Kogyo Co., Ltd., et al.

Northcon I, the plaintiff in the case at the bar, is an Oregon partnership created for the project to develop in Oregon a facility for Maruman Integrated Circuits, Inc. (hereinafter referred to as MIC), a California corporation. MIC was a subsidiary of Mansei Kogyo Co. (hereinafter referred to as Mansei Co.), first defendant in the present case, a Japanese corporation. A dispute arose from a lease agreement between Northcon I and MIC, and MIC filed an action in the Superior Court of the State of California against Northcon I. The present case ensues from the counterclaim presented by Northcon I against Mansei Co. and its chief executive officer, Yoshitaka Katayama (hereinafter referred to as Katayama), second defendant in the case at hand, and other officers of Mansei Co. and MIC.

According to Section 3294 of the California Civil Code,[1] in an action for the breach of an obligation not arising from contract, where it is proven that the defendant has been guilty of fraud, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

On May 19, 1982, the Superior Court of California rendered the judgment as stated below on grounds of fraudulent acts by Mansei Co., Katayama, and others in making the lease agreement. Mansei Co. and Katayama are to pay $425,251 as compensatory damages and $40,104.71 as costs. In addition, Mansei Co. is to pay $1,125,000 as punitive damages. On May 12, 1987, the Court of Appeals of the State of California affirmed this judgment (hereinafter referred to as the Foreign Judgment) and the Foreign Judgment became irrevocable.

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(1) Section 3294(a) of the California Civil Code:

'In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.'

Northcon I filed this action in the Tokyo District Court against Mansei Co. and Katayama for permission to enforce the foreign judgment in the case. On February 18, 1991, the District Court granted enforcement of the compensatory damages, including interest, not contained in the text of the foreign judgment in the case. On the other hand, enforcement of the punitive damages was refused on the ground that such enforcement was contrary to public policy in Japan as laid down in indent iii of Article 200 of the Code of Civil Procedure.(2) Both plaintiff and defendants appealed to the Tokyo High Court. The High Court affirmed the judgment of the District Court and dismissed both appeals.

Plaintiff Northcon I appealed to the Supreme Court, in particular to grant enforcement of the punitive damages on defendant Mansei Co. On the other hand, defendants Mansei Co. and Katayama appealed to the Supreme Court to deny the enforcement of the interest not contained in the text of the judgment.

The following Supreme Court judgment deals only with the appeal by plaintiff Northcon I. For the judgment on the appeal by defendants Mansei Co. and Katayama, see Supreme Court Judgment, 11 July, 1997; Minsyu (vol.51, No. 6) 2530 [1997], infra p. 107.

Held: 'The appeal regarding appellee Mansei Co., Ltd. is dismissed.'

Upon the grounds stated below:

'2. (a) In an action for enforcement of a foreign judgment, it is determined pur-

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(2) Minji Sosho Ho (the Code of Civil Procedure) [1890 Act No. 29 as amended by 1948 Act No. 149, etc.] Article 200:

'An irrevocable judgment in a foreign court shall have its effect in so far as it satisfies the following conditions:

(i) the jurisdiction of the foreign court is not denied either by law or a treaty

(ii) if the defeated defendant is a Japanese, the defendant was served a summons or an order necessary for the commencement of the procedure other than by service by publication, or has voluntarily appeared without being so served;

(iii) the judgment of the foreign court is not repugnant to the public policy in Japan; and

(iv) reciprocity is given.'

Article 200 was amended and renumbered as Article 118 in the New Code of Civil Procedure (1996 Act No. 109, which went into effect on January 1, 1998). While Article 118 maintains the basic structure of Article 200 of the old Code, indent ii extends to non-Japanese and indent iii covers "the judgment and procedure of the foreign court."

suant to Article 24 of the Civil Execution Act[3] whether it satisfies the conditions set forth in Article 200 of the Code of Civil Procedure. In particular, indent iii of Article 200 of this Code requires that the foreign judgment not be contrary to the public policy of Japan. It would not be correct, of course, to jump to the conclusion that it is contrary to Japanese public policy from the mere fact that the foreign judgment contains something that our legal system has not adopted. However, if it is found to be incompatible with the fundamental principles or basic tenets of the Japanese legal system, it must be said to be contrary to Japanese public policy under the above provision.

(b) The punitive damage system under the California Civil Code is to order the offenders who have performed a malicious act to pay damages in addition to the payment of actual damages, which clearly intends to punish the offenders and to deter future acts of the same kind. Thus, in terms of the purpose, the system has the same function as a fine and other criminal punishment in this country. In contrast, the Japanese system of compensatory damages based on torts purports to restore a victim to the state in which it would have been if torts were not performed by the offender, by assessing the actual loss caused to the victim in terms of the pecuniary sum and making the offender compensate the victim for that sum (See Supreme Court Judgment, March 24, 1993...). It is not meant as a punishment of the offender or the deterrence of similar conduct in the future (i.e., general prevention). Of course, imposing on the offender liability for damages may have the effect of punishment of the offender or of general prevention. However, such is only a subordinate effect derived from the liability for damages which is imposed on the offender in order to

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(3) Minji Shikko Ho (Civil Execution act [1979 Act No. 4 as amended by 1989 Act No. 91, etc. and 1996 Act Nos.108 and 110])

'Article 24:

(1) An action for a judgment granting execution of a judgment of a foreign country shall be under the jurisdiction of the court of the general forum of the debtor or, in a case where there is no such general forum, it shall be under the jurisdiction of the district court where the matter subject to the claim or any attachable property of the debtor is located.

(2) A judgment granting the execution shall be rendered without inquiring into the correctness of the adjudication.

(3) An action under paragraph (1) shall be dismissed where the conclusiveness of the foreign judgment is not proved, or where it does not fulfill the conditions set forth in the subparagraphs of Article 200 of the Code of Civil Procedure.

(4) In a judgment granting the execution, it shall be declared that an execution is granted under the judgment of a foreign court.

restore the loss incurred by the victim. Thus, our liability system is essentially different from the punitive damages system, which has the primary purpose of punishment and general prevention. In this country, it is left to the criminal or administrative sanctions to punish the offender and to deter similar conduct in the future. Thus, it is incompatible with the fundamental principles or basic tenets of the Japanese system of damages based on torts to hold that between the parties in a tort, the victim may receive from the offender damages intended for punishment and general prevention in addition to the damages caused by the actual loss.

(c) Therefore, enforcement of the part of the Foreign Judgment ordering the appellee company punitive damages — in addition to the compensatory damages and costs shall have no effect because it is contrary to the public policy of Japan.

3. Accordingly, we affirm the judgment of the Tokyo High Court denying the enforcement of the part of the Foreign Judgment ordering payment as punitive damages....'

Enforcement of Foreign Judgment — Judgment by a State Court in California — Enforcement of Interest Based on the Foreign Judgment

Supreme Court Judgment, 11 July 1997; 51 Minshu (6) 2530 [1997]

Mansei Kogyo Co., Ltd., et al. v. Northcon I, an Oregon Partnership

The following Supreme Court judgment deals only with the appeal by defendants Mansei Kogyo Co., Ltd. (hereinafter referred to as Mansei Co.), and its chief officer, Yoshitaka Katayama (hereinafter referred to as Katayama), to prevent the enforcement of the interest not contained in the text of the judgment. For the judgment on the appeal by plaintiff Northcon I, seeking the enforcement of the punitive damages on defendant Mansei Co., see Supreme Court Judgment, 11 July 1997; 51 Minshu (6) 2573 [1997], translated supra p. 104. The facts other than stated below are also found in the above translation.

According to Section 3294 of the California Civil Code, in an action for the breach of an obligation not arising from contract, where it is proven that the defendant has been guilty of fraud, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

On May 19, 1982, the Superior Court of the State of California rendered the judgment as stated below on grounds of fraudulent acts by Mansei Co., Katayama, and others in making a lease agreement. Mansei Co. and Katayama are to pay $425,251 as compensatory damages and $40,104.71 as costs. In addition, Mansei Co. is to pay $1,125,000 as punitive damages. On May 12, 1987, the Court of Appeals of the State of California affirmed this judgment (hereinafter referred to as the Foreign Judgment) and the Foreign Judgment became final.

Under California law, the money ordered in a judgment to be paid bears 7 percent interest from the date of judgment to June 30, 1983, and 10 percent interest from July 1, 1983. Such interest is enforceable even if it is not contained in the text of a judgment.

The original court granted compulsory execution based on part of the Foreign Judgment, excluding part that orders punitive damages against the defendant-appellant company, which orders the defendants-appellants to pay compensatory damages, costs, and the interest (hereinafter referred to as "the interest in question") on that sum at 7 percent a year on and after 19 May 1982 until 30 June 1983, and at 10 percent on and after 1 July 1983.'

Held: 'The appeal is dismissed.'

Upon the grounds stated below:

'In a decree to enforce a judgment, it is declared that compulsory execution based on a judgment of a foreign court is granted (Civil Execution Act, Art. 24 (4)), and the compulsory execution is carried out in accordance with the judgment of the foreign court accompanied by the irrevocable decree to enforce the judgment (Civil Execution Act, Art. 22 (4)). In such a system, the declaration by the executory decree to grant the compulsory execution should be limited in principle to what is stated in the judgment of a foreign court. However, the Foreign Judgment before us makes no mention of the interest in question. On the other hand, when the clear and calculable interest is incurred on the sum of money ordered to be paid by the judgment, it is a technical matter to have the awarding of the interest stated in the judgment itself or to make it enforceable by the force of statutory provisions. To recognize the effect of the judgment of a foreign court in Japan is to recognize the effect which the very judgment has in the relevant foreign country. According to the law of the State of California, the interest in question is to occur in connection with the sum of money ordered to be paid by the judgment and is to be enforceable as such. For the foregoing reason, the judgment below should be affirmed in that it granted

the enforcement of part of the Foreign Judgment, which ordered the payment of the interest in question in addition to the payment of compensatory damages and cost.'

Applicable Law — Formation and Validity of International Arbitration Agreement

Supreme Court Judgment, 4 September 1997; 6 Saibansho-Jiho (1203) 6 [1997]

Nihon Kyoiku-sha Co., Ltd. v. Kenneth J. Feld

Plaintiff-Appellant Nihon Kyoiku-sha Co., Ltd. (hereinafter referred to as the Plaintiff), is a Japanese corporation and Defendant-Appellee Kenneth J. Feld (hereinafter referred to as the Defendant) is the representative of a corporation of the United States of America (hereinafter referred to as "Ringling Inc."). On October 2, 1987, Plaintiff and Ringling Inc. entered into an Agreement for the performance of the Ringling circus in Japan during 1988 and 1989 (hereinafter referred to as the Show Agreement). At the time of making the Show Agreement, Appellant and Ringling Inc. made an arbitration agreement as follows (hereinafter referred to as the Arbitration Agreement). If a dispute including the interpretation or application of the provisions of the Show Agreement is not settled, that dispute shall be submitted to arbitration, by the request of one of the parties, in accordance with the rules and procedures of the International Chamber of Commerce relating to the arbitration of commercial disputes. Arbitration initiated by Ringling Inc. shall be submitted to arbitration in Tokyo, and arbitration initiated by the Plaintiff shall be submitted to arbitration in New York City.

The Plaintiff filed this action in the Tokyo District Court against the Defendant seeking for damages based on a tort on the part of the Defendant. In addition to the assertion that the performance by Ringling Inc., was not as contemplated in the Show Agreement, it is alleged that the Defendant deceived the Plaintiff regarding the share of the profits from the sale of such products as featured the circus and the duty to pay for tents used to house animals. The Defendant moved to dismiss the action, asserting that the Arbitration Agreement between the appellant and Ringling Inc. has effect on the present action.

The Tokyo District Court granted the Defendant's motion and dis-

Exhibit 15

Journal of World Trade 40(4): 753–776, 2006.

The Blocking Legislation as a Countermeasure to the US Anti-Dumping Act of 1916: A Comparative Analysis of the EC and Japanese Damage Recovery Legislation

Mitsuo MATSUSHITA[1] and Aya INO[2]

I. INTRODUCTION

The US Act under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916, or, more commonly known as the "Anti-Dumping Act of 1916" (hereinafter, the 1916 Act), has not only served as the basis for lawsuits filed in the US by US entities against Japanese and EC companies, but in itself has also caused indirect chilling effects on exporters of those countries. Against these backdrops, Japan and EC brought a case against the United States for violation of the relevant WTO Agreements by the 1916 Act, a dispute which has yet to be resolved since 1998.

In the World Trade Organization (WTO), the Dispute Settlement Body (DSB) has adopted the reports of the panel and the Appellate Body (AB), confirming the US violation. In spite of such findings, the United States had not, until only very recently, signed the bill repealing the 1916 Act. According to the Understanding on Rules and Procedures Governing the Settlements of Disputes of the WTO (Dispute Settlement Understanding, or DSU), if a losing party does not implement the recommendation and rulings of the DSB, the complaining party can proceed to the process for suspension of concessions or other obligations (hereinafter, retaliation or retaliatory measures) after a certain period. Pursuant to such provisions, Japan and the EC made requests for authorization of respective retaliatory measures, and the arbitral award for the EC request was subsequently issued (while Japan requested suspension of the proceedings upon mutual agreement with the United States).

While such arbitral awards recognized to a certain extent the right for the EC to retaliate, encompassing a basis for calculating a verifiable amount of nullification or impairment suffered by the EC, the issued arbitral award set for calculation some parameters, including final judgment or disclosure of the terms of settlements, where the former was nonexistent and the latter undisclosed for commercial reasons. For Japan and the EC, such an award did not stand as a basis for retaliation in practice, since

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[2] Consultant at Trade Policy Unit, UFJ Institute; former adviser for Mission of Japan to the International Organizations in Geneva.

their companies were still left exposed to lawsuits in the United States all along these proceedings. Therefore, the EC took the first steps to adopt Regulation No. 2238/2003, which serves as a so-called "blocking legislation" for "protecting against the effects of the application of the United States Anti-Dumping Act of 1916, and actions based thereon or resulting therefrom".

As for Japan and her companies, in December 2003, Goss International Corporation, a US maker of newspaper printing presses, brought the case against its rival Japanese manufacturer, Tokyo Kikai Seisakusho (TKS) under the 1916 Act before the US District Court for the Northern District of Iowa, where after the jury verdict TKS was judged to pay around US$ 30 million. This case is now pending before the 8th Circuit Court of Appeals. Furthermore, the trustee in bankruptcy of a US marine engine company sued the company's former Japanese rivals including Yamaha and Honda under the 1916 Act at the end of 2004. Seeing these cases unfold, the momentum arose in Japan to introduce a blocking legislation similar to that of the EC, which subsequently led to the enactment of the Law No. 162 (8 December 2004).

Based on these developments, this article will review the following:

1. Dispute settlement proceedings under the DSU for both cases brought by Japan and the EC, including the substance of the reports by the panel and the AB, and the arbitral award regarding the WTO-consistency of the authorization request for retaliation;
2. EC's blocking legislation; and
3. Japan's blocking legislation.

II. Proceedings in the WTO and the EC's Blocking Legislation

A. Overview of the proceedings in the WTO

As mentioned above, both Japan and the EC brought the case against the United States in the WTO, but the EC's case preceded that of Japan.[3] Both procedures were unified at the appellate review phase, and were more or less in unison until the expiration of the "reasonable period of time (RPT)" for implementation after the adoption of the reports. However, when it came to the retaliation stage, they started to show some divergence. While the EC quickly stepped up to request authorization for her retaliatory measure and entered into arbitral phase, Japan chose to induce the United States to implement the DSB's recommendations and rulings, that is the repeal of the 1916 Act. The two different responses seem to have stemmed from the fact that

[3] As for the EC case, the request for consultation was made in June 1998, and then followed the Panel request followed in November. The Panel report was issued in March 2000. In Japan's case, the request for consultation was made in February 1999, followed by the Panel request in June, and the Panel report was issued in May 2000. The two Panel reports show no inconsistency with additional respective findings for independent claims brought up by either of the two.

while Japan had the above-mentioned case (*Goss International Co. v. TKS*) still pending, cases brought against EC companies were settled in the United States by the time of arbitration.[4]

The following will briefly describe the 1916 Act, the reports of the Panel and the AB, and the arbitral award.

B. The 1916 Act

The 1916 Act prohibits the business activity, which is a form of international price discrimination containing two basic components: 1) an importer must have sold a foreign-produced product within the United States at a price which is "substantially less" than the price at which the same product is sold in the county of the foreign producer, (2) the importer must have undertaken this price discrimination "commonly and systematically". The condition for criminal or civil liability under the 1916 Act is that the importer must have undertaken this price discrimination with "an intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such article in the United States". The Act also provides for a private right of action in a federal district court and the remedy of treble damages for a private complainant, based on the injury sustained by that complainant in its business or property, as well as for criminal penalties in an action brought by the US government.[5]

A further striking feature of the 1916 Act is the absence of its application since its enactment in 1916 for a variety of reasons including the difficulty in establishing the "intent" requirement. The Act has been invoked, indeed, but all of the cases resulted in dismissal or settlement, until the single recent case against the Japanese company. This feature of the Act makes a significant impact when paired with the required calculation of the level of the nullification or impairment for retaliatory measures in the WTO process. In the absence of applications, how can the level of nullification or impairment caused by the 1916 Act be calculated? Or verification of the effect or damage caused by the law as such? Can the so-called chilling effect from the 1916 Act be included in the calculation? All of these questions arose at the implementation phase.

C. Brief summary of the reports of the panel/AB

The Panel and the AB focused mainly on three issues during the review. Those are: the relationship between Article VI of the GATT and the Anti-Dumping Agreement (ADA) (only in the Japanese case); the distinction of the 1916 as either

[4] Goss International Co. brought the case against TKS in December 2003, while it reached a settlement with German company in December 2002. The arbitration was suspended in January 2002, and was reopened in September 2003. WT/DS135/ARB, footnote 87 s.

[5] WT/DS162/R, paras 2.2–2.4.

mandatory or discretionary doctrine; and the applicability of GATT Article VI as well as the ADA to the 1916 Act. Besides these three issues, the injury requirement embodied in Article VI:1 was on the table due to the argued lack of such requirement in 1916 Act. We will briefly touch upon the findings and conclusions of the panel and the AB in the following subsections.[6]

1. *Jurisdiction Issue: Relationship between Article VI of the GATT and the ADA*

This issue arose in the US response to the claim by Japan that the 1916 Act is concurrently inconsistent with GATT Article VI and the ADA. The United States argued that in light of Article 17.4 of the ADA as well as the precedents such as *Guatemala—Cement*[7] and *Brazil—Desiccated Coconut*[8], the panel does not have jurisdiction to review the consistency of the 1916 Act as such with the ADA. The United States insisted that in *Guatemala—Cement*, the AB found that the only matters challengeable under the ADA are the anti-dumping measures set forth in Article 17.4 of the ADA (either a definitive measure, acceptance of a price undertaking, or a provisional measure), and in *Brazil—Desiccated Coconut*, the Panel decision, upheld by the AB, denied its jurisdiction to decide a claim under Article VI by noting that Article VI is not independently applicable to a dispute to which the ADA is inapplicable.[9]

The Panel in this case concluded that Article 17 of the ADA does not prevent itself from reviewing the conformity of the law as such with GATT Article VI as well as the ADA, first because there is no explicit limitations on the application of the DSU in ADA Article 17, second because such confinement to specific applications taken will result in nullification of the Article 18.4, which requires WTO Members to make their AD laws conform to the Marrakesh Agreement, and third because the factual situation of this case is different from that of the precedents upon which the United States relied.[10] The Panel also noted that Article VI of GATT and the ADA form parts of an "inseparable package of rights and obligations" and that it can make findings under GATT Article VI without the findings under the ADA, and vice versa.[11]

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[6] Other issues include: (1) the consistency of criminal liability under the 1916 Act with GATT Article VI:2 which stipulates that the only permissible remedy under the Agreement Establishing the World Trade Organization (hereinafter, Marrakesh Agreement) is AD duties; (2) the consistency with the various Articles of the ADA regarding the investigation procedures; (3) the consistency with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the ADA that require the conformity of domestic laws with WTO Agreements (and Article 18.1 of the ADA by Japan Panel only); and (4) the consistency with Article III:4 of the GATT requiring equal treatment to both imported and domestic products. The US was found to violate those Articles, except 4) where the Panel exercised judicial economy.

[7] *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, 19 June 1998, WT/DS60/R, 98-2418, 25 Nov. 1998, WT/DS60/AB/R, 98-4190.

[8] *Brazil—Measures affected desiccated coconut and coconut milk powder*, WT/DS30.

[9] WT/DS162/R, paras 6.10, 6.81–82.

[10] The Panel pointed out that the issue in *Guatemala—Cement* was whether either of the three measures should be identified or not in relation to the initiation and conduct of anti-dumping investigation, and in *Brazil—Desiccated Coconut*, the findings dealt with the non-applicability of the Agreement on Subsidies and Countervailing Measures to existing measures or investigations initiated pursuant to applications made before the entry into force of that Agreement. WT/DS162R, 6.88–6.91.

[11] WT/DS162/R, paras 6.93–6.94.

The AB supported the rights of Japan and the EC to raise the issue of inconsistency of the 1916 Act as such with GATT Article VI and the ADA, thereby upholding the findings by the Panel on jurisdictions thereof based on such grounds as the practice of GATT Panels that developed the concept of mandatory/discretionary law.[12] (Article 18.4, ADA Article 18.1, and the interpretation of dispute settlement procedures under ADA Article 17.1[13]).

2. *Nature of the 1916 Act: "Mandatory/Discretionary"*

The parties fought over the issue because the United States defended, first that with respect to both civil and criminal proceedings, US courts could interpret the 1916 Act consistently with the WTO obligations (and in fact have done so), and second, that the Department of Justice (DOJ) under the 1916 Act has the discretion on whether to initiate the criminal proceedings or not, and thus the Act is a discretionary legislation which should be found non-violative of the WTO Agreements in accordance with the GATT/WTO practice. In addition, the United States referred to *US—Cigarettes*, which ruled that the burden of proof for inability of consistent interpretation lies on the complaining party, to push that such burden must be carried by the complaining parties in this case as well.[14]

The Panels, on the first point, noted that it is simply a question of assessing the current meaning of the law.[15] Furthermore, it noted that, in *US—Cigarettes* the burden was on the complaining parties because the ambiguous term of the law had never been applied, but in contrast, the courts had applied the 1916 Act, and that the complaining parties only had to prove that the Act fell within the scope of GATT Article VI. Thus, the panels said that the factual situation in this case was different from that in *US—Cigarettes*.[16]

On the second point, the Panels noted that it indeed was a question of mandatory/discretionary doctrine[17] and after finding that the 1916 Act did fall within the scope of GATT Article VI as well as the ADA,[18] ruled that the 1916 Act could not be considered as discretionary on the basis of the DOJ's such discretion, following the precedents that found that the discretion in initiating AD investigations could not be

[12] Particularly pointing to the "acquis" of Article XVI:1 of the Marrakesh Agreement as the relevant provision. WT/DS136/AB/R, WT/DS162/AB/R, para. 61.

[13] Article 18.4 obliges WTO Members to bring their legislation into conformity with the ADA. Article 18.1 requires the specific actions against dumping to conform with the ADA. Article 17.1 does not distinguish between claims of law as such and law as applied; in particular, Article 17.4, purpose of which is to balance on the one hand the rights of the complaining parties who seek to redress the effect of AD measures that may be inconsistent with the WTO Agreements and on the other the rights of the responding parties who face the risk of wasting their resources by being complained at some phase during AD investigations, has no influence over the rights of complaining parties to make claims of law as such. Ibid., para. 73.

[14] WT/DS136/R, paras 6.82, 6.85, WT/DS162/R, paras 6.95, 6.98.

[15] WT/DS136/R para. 6.84, WT/DS162/R para. 6.97.

[16] WT/DS136/R paras 6.86–6.90, WT/DS162/R paras 6.100–6.104.

[17] WT/DS136/R para. 6.84, WT/DS162/R para. 6.97.

[18] WT/DS136/R, 31 March 2000, paras 6.163–165, WT/DS162/AB/R, paras 6.182–184.

the basis of a discretionary legislation, and the obligation under ADA Article 18.4 to bring the AD legislation itself into conformity with the ADA.[19]

The United States repeated its claims in the AB proceedings, but the conclusion of the panel was upheld. To start, the AB stated that the GATT practice regarding mandatory/discretionary doctrine was summed up in *US—Cigarettes*, which found that a law that merely gave the discretion to the executive branch to act inconsistently with the GATT could not be challenged as such.[20] The AB then noted that the civil action initiated by private parties under the 1916 Act were not confined to the discretion of the executive branch and that the 1916 was indeed a mandatory legislation. Moreover, as for the criminal action, it continued that the discretion of the DOJ did not transform such nature of the 1916 Act into a discretionary legislation.[21] In addition, the AB agreed with the Panel's finding that the interpretation of the US courts did not fall under the discretion of the executive branch and so unrelated to the mandatory/discretionary doctrine. Thus, it supported the findings of the Panels considering the issue as a matter of determining the meaning of the law.[22]

3. *Applicability of GATT Article VI and ADA to the 1916 Act*

(a) *Applicability of GATT Article VI and ADA*

This issue was disputed because the United States argued that GATT Article VI only addresses actions taken for the purpose of offsetting or preventing injurious dumping and it is inapplicable to the antitrust law, such as the 1916 Act.[23]

The panel for the EC case stated that while GATT Article VI and the ADA are "inseparable package of rights and disciplines", this fact did not prevent the Panel from making separate findings accordingly to the reference made by the complainant, the EC.[24] The Panel found that there was a "very strong similarity" between "dumping" as defined in GATT Article VI:1 and "transnational price discrimination test" provided in the 1916 Act, and since subjectability to Article VI was defined as counteractions to "dumping" as in Article VI:1, it concluded that the 1916 Act was indeed subject to Article VI.[25] Further, the EC Panel ruled that the additional conditions found in the 1916 Act such as "substantial", "commonly and systematically", and "intention" besides the price difference test were simply the additional requirements,[26] and that neither the antitrust objective nor such categorization as an antitrust law in the United

[19] *EC—Audio Cassette*, WT/DS136/R, para. 6.168, WT/DS162/R, para. 6.189.
[20] WT/DS136/AB/R, WT/DS162/AB/R, para. 88.
[21] Ibid., paras 90–91.
[22] Ibid., para. 101. The US appealed not the Panel's finding but its reasoning as for the discretion of the Department of Justice. The AB in any case rejected the US argument (paras 92–99).
[23] WT/DS136/R paras 6.94–95.
[24] WT/DS136/R para. 6.97.
[25] Ibid., paras 6.108, 6.118.
[26] Ibid., para. 6.112.

States changed the conclusion unless such objective or categorization altered the operation of the 1916 Act.[27]

However, the Panel for the Japan case, after noting that if the 1916 Act fell within the scope of GATT Article VI, then it also fell within the ADA,[28] it considered the following three points to determine the consistency of the 1916 Act with Article VI: (1) whether the 1916 Act addresses the same type of price differentiation as Article VI; (2) that being the case, whether the aforementioned additional requirement in the 1916 Act is relevant in determining the subjectability of the 1916 Act to Article VI; and (3) whether the measures taken under the 1916 Act are also relevant to determining the same subjectability.[29]

On the first point, the Japan Panel, as the EC Panel did, found "a very close similarity" between the two, and reached the same conclusion on the applicability of the GATT Article VI.[30] As for the second and third points, the Japan Panel followed along the similar reasonings drawn by the EC panel and concluded that those elements are not relevant in determining the scope of Article VI of the GATT.[31]

In addition to the aforementioned findings, the Japan Panel took note of the age of the 1916 Act, which is nearly 80 years old, and considered the historical context and the legislative history as well as the US case law of the 1916 Act, only to find that such consideration does not affect the conclusion.[32]

At the appellate review stage, the United States appealed these Panels' conclusions by arguing that in order for GATT VI to be applicable, the law must impose anti-dumping duties and "specifically target" dumping within the meaning of Article VI:1. The United States emphasized that the 1916 Act provides for treble damages or criminal penalties besides dealing with predatory pricing, instead of "specifically targeting" dumping, thereby making GATT VI inapplicable to the 1916 Act.[33] The United States further argued that by stipulating that the Members "may levy" AD duty, GATT Article VI:2 allows Members to choose measures which are either bound or unbound by Article VI where the former corresponds to the three measures[34] provided in ADA Article 1 as subject to GATT Article VI,[35] and the latter to measures other than those three.[36]

In light of such US arguments, we will touch upon the Panels' review on GATT Article VI:2 before turning to the findings of the AB.

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[27] Ibid., para. 6.117.
[28] WT/DS162/R, para. 6.108.
[29] Ibid., para. 6.114.
[30] Ibid., paras 6.119–6.128.
[31] Ibid., paras 6.135, 6.137.
[32] WT/DS136/R paras 6.119–162, WT/DS162/R paras 6.139–181.
[33] WT/DS136/AB/R, WT/DS162/AB/R para. 104.
[34] Definitive anti-dumping duties, price undertakings and provisional measures.
[35] Article 1 of the AD Agreement in relevant part states: "an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement..."
[36] Ibid., para. 112.

(b) *Findings of the Panel on GATT Article VI:2*

The EC argued that the purpose of the verb "may" in Article VI:2 of the GATT is not to oblige Members to impose anti-dumping duties, as confirmed by Articles 1 and 18 of the ADA. Hence, the 1916 Act which imposes measures other than anti-dumping duties such as treble damages or criminal penalties runs foul of GATT Article VI:2. Japan basically followed the EC's line. However, the United States rebutted that the verb "may" allows for WTO Members to apply measures other than anti-dumping duties, which is evident in references including the negotiating history.[37] The panels interpreted Article VI:2 of the GATT as such that the purpose of the anti-dumping measures is "to offset or prevent dumping" instead of imposing punitive measures, and thus the verb "may" gives Members the choice between anti-dumping duties which are either equal to, or lower than, the dumping margin. The Panels, consequently, concluded that the ordinary meaning of the above-mentioned terms support the view that the anti-dumping duties are the only type of remedies allowed under Article VI.[38] In addition, the Panels confirmed its conclusion by referring to the contexts of Article VI:2 such as Articles 1 and 18.1 of the ADA (including footnote 24), the negotiating history, the objective and purpose of the GATT, the ADA, and the Marrakesh Agreement.[39]

(c) *Findings of the AB*

The AB upheld the rulings of the Panels and rejected the US arguments. The AB firstly noted that the verb "may" in Article VI:2 of the GATT gives Members only a choice between imposing an anti-dumping duty or not, as well as a choice between imposing an anti-dumping duty equal to, or lower than, the dumping margin, and that "an anti-dumping measure" as provided in Article 1 of the ADA is inclusive of all measures against dumping without any explicit exemptions. In addition, it viewed that the phrase, "specific action against dumping" embodied in Article 18.1 of the ADA is action "taken in response to situations presenting the constituent elements of 'dumping'", which must, at minimum, encompass actions that may be taken "only when the constituent elements of 'dumping'" are present.[40] From these perspectives, the AB found that the 1916 Act requires the presence of the constituent elements of dumping, and such are built into civil and criminal liability under the 1916 Act as essential elements, thereby upholding the conclusion of the Panels that Article VI of the GATT as well as the ADA is applicable to the 1916 Act. As for the intention test found in the 1916 Act, the AB saw no relevance to the applicability of the Article VI to the 1916 Act, viewing it only as an additional requirement.[41]

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[37] WT/DS136/R paras 6.183–6.185, WT/DS162/R, paras 6.201–203, 6.207.
[38] WT/DS136/R para. 6.190, WT/DS162/R, para. 6.212.
[39] Only Japan panel referred to the object and purpose.
[40] WT/DS136/AB/R, WT/162/AB/R paras 116–122.
[41] Ibid. para. 132.

4. *Other Issues: the Consistency with Article VI:1 of the GATT*

Article VI:1 of the GATT provides for the injury requirements to impose anti-dumping measures. The EC argued that the 1916 Act is inconsistent with GATT Article VI:1 and ADA Article 3 that stipulates "material injury" requirement, because nothing in the 1916 Act ensures the correspondence with such requirement.[42] Japan added the violation of Article VI:6(a) to the EC's claims on a similar basis.[43]

The Panels took note of the intent test in the 1916 Act, but viewing that such test does not necessarily require the finding of actual injury or actual threat of injury, and concluded the 1916 Act violates Article VI:1.[44] As for the VI:6(a) violation claimed by Japan, the Panel did not make further rulings, since it saw the Article as requiring injury determination by relevant authorities of the importing Member, but not an additional obligation.[45] The United States appealed this finding solely based on the argument that the 1916 Act is out of the scope of GATT Article VI as well as the ADA, which the Panel found, being upheld by the AB, otherwise.

D. Brief summary of the arbitration under article 22.6 of the DSU

After the adoption of the reports of the Panels and the AB in September 2000, the RPT for implementation was set to expire on 26 July 2001, which was subsequently extended, in order to induce US compliance, to expire on 31 December 2001, or the date on which the session of the US Congress adjourned, whichever the earlier, upon parties' agreements. However, the 1916 Act was not repealed by the deadline of the RPT, hence the pending cases in the US domestic courts involving the companies of Japan and the EC under the 1916 Act continued.

In accordance with Article 22 of the DSU, which stipulates the process of the retaliatory stage, Japan and the EC requested the DSB for authorization of retaliation in January 2002. They both sought for suspension of their obligations under WTO Agreements in order to introduce measures similar to the 1916 Act, measures often referred to as a "mirror legislation," to be authorized.[46] This is characteristically unique to this case, because most of the past requests under Article 22 of the DSU involved suspension of concessions, which imply raising tariff concessions, together with suspension of obligations.

Against such request by Japan and the EC, the United States revoked Article 22.6 of the DSU, which enables a defending party to object the level of requested suspension, or to claim that the principles and procedures under the DSU were not

[42] WT/DS136/R, para. 6.178.
[43] WT/DS162/R, para. 6.251.
[44] WT/DS136/R, paras 6.180–181, WT/DS162/R, paras 6.252–253.
[45] WT/DS162/R, para. 6.253.
[46] WT/DS136/15, WT/DS162/18. Unlike the EC, Japan's request simply seeks for suspension of the application of the relevant obligations under the relevant agreements solely against the US, not describing the measures in detail (WT/DS162/18).

properly followed through the arbitration.[47] The arbitral proceedings were once suspended when the bill repealing the 1916 Act was brought into the US Congress. When the bill failed, the proceedings were reactivated in September 2003, upon request by the EC.

Meanwhile, the EC introduced Council Regulation (EC) No.2238/2003, a so-called "blocking legislation", in December 2003. The essence of this regulation is, firstly, to prohibit recognition or enforcement within the EC of any judgments or actions in the United States under the 1916 Act, and secondly, to entitle EC companies or individuals that suffered from the litigations in the United States to sue those original complainants, the relevant US companies, in the EC courts to recover the damage and the costs for litigation.[48] During the arbitral proceedings, the United States argued that such introduction of the blocking legislation confirmed the level of nullification or impairment of the EC is "zero," but the arbitrators found such legislation was not within their terms of reference.[49] Section V further touches upon the EC's blocking legislation.

1. *Brief Description of the EC's "Mirror Law"*

According to the EC's request for authorization from the DSB, the "mirror legislation" has the following characteristics:[50] allows the EC "to impose on US companies found to dump their products in the EC additional duties corresponding to three times the amount of the damage suffered by companies in the EC" for the period of anti-dumping duties normally imposed that is five years; carries requirements for imposing the measures such as "certain specific intents" as well as other procedural aspects which are "analogous to those required under the 1916 Act"; provides that investigations be carried out by the EC authorities responsible for the application of its anti-dumping legislation instead of the courts; and will not pay back the additional duties collected to complainants.

The EC also provided the so-called "Methodology Paper" in response to the request of the arbitrators to describe the measure subject to arbitration as well as the methodology for calculating the proposed level. This paper featured the "mirror legislation" as follows: basing on the equivalent requirements as under the 1916 Act, the condition for the application of special duties are (1) the finding of dumping by a US company, (2) damage to the complaining EC company(ies), and (3) the intent to destroy or injure an industry in the EC, or to prevent the establishment of an industry in the EC, or to restrain or monopolize any part of trade and commerce of such

[47] The US grounds for the referral of the matter to the arbitration differentiate between Japan and the EC. With respect to the EC case, the "level" was at an issue, while the violation of Article 22.3 prescribing the procedures for request for authorization was also claimed against Japan. The arbitration between Japan and the US will not be touched upon in this article, since it was suspended in February 2002 and thereafter.

[48] European Commission HP (http://trade-info.cec.eu.int/wtodispute/).

[49] WT/DS136/ARB paras 3.16–20.

[50] WT/DS136/15.

products in the EC; but differs from the 1916 Act in that it does not provide for fines or imprisonment, EC anti-dumping authorities impose duties instead of the courts, duties collected are not paid to the complainants, and there are no procedural violations of the ADA.[51]

2. *Brief Summary of the Award of the Arbitration*

In reviewing the case, the arbitrators first examined the procedural issues, and then specified their mandates as determining the equivalency of the level of retaliation requested for authorization to the level of nullification or impairment sustained by the complaining party as a result or non-compliance by the responding party.[52] When the level is determined as non-equivalent, then the arbitrators are to determine the equivalent level of retaliation, being enjoined from examining "the nature of the concessions or other obligations to be suspended".[53] In addition, as a premise of examination, the arbitrators noted that the fundamental objective of the suspension of obligations is "to induce compliance" and the concept of "equivalence" is to secure that obligations cannot be suspended "in a punitive manner".[54]

(a) *How to measure the equivalency: "qualitatively equivalent" or "quantitatively equivalent"*

The arbitrators in this case faced the examination of suspension of "qualitatively equivalent" obligation. As mentioned in the previous section, the 1916 Act has never been applied to any case but one since enactment, the fact which renders assessment of nullification or impairment sustained by the complaining party under the 1916 Act difficult. In fact, this is the very reason why Japan and the EC have requested the suspension of obligation under the covered agreement to introduce mirror legislations as retaliatory measures against US non-compliance. However, it is difficult to indicate the level of suspension quantitatively in such a form. This case is the first case where a WTO Member sought suspension of "qualitatively equivalent" obligations.[55]

In this regard, the EC argued that it is unnecessary to limit the application of the mirror legislation quantitatively, since there is no quantitative limit for the application of the 1916 Act, nor does DSU Article 22.4 set an obligation to specify a quantitative level of nullification and impairment.[56] However, the United States rebutted that rough

[51] WT/DS136/ARB para. 2.9.

[52] Procedural issues examined are the burden of proof and the necessity for the EC to specify the obligation to be suspended. The arbitrators set the burden of proof for a violation of the alleged Article on the claimant, the US, and the rebuttal obligation to the proved presumption of such violation on the EC. They also obliged both members for establishing the existence of a specific facts, and cooperation with the arbitrators in presenting evidence. They denied the EC's obligation to specify the obligation to be suspended in light of the wording of Article 22.6 and past practices. Ibid. paras 3.4–3.6, 3.10–15.

[53] WT/DS136/ARB paras 4.5, 4.9.

[54] Ibid., para. 5.7, para. 5.8.

[55] Ibid., para. 5.17.

[56] Ibid., paras 5.10, 5.11.

similarity between the mirror legislation and the 1916 Act does not create a presumption that the level of suspension of obligations is equivalent to the level of nullification or impairment of benefits and thus there is no such equivalency. The United States further objected that US companies could be imposed a treble damage without any limitations under the mirror law, even though in the United States no company has ever been subjected to a treble damage award under the 1916 Act since its enactment. In addition, the United States argued that the past precedents consistently specified the quantifiable level of trade impairment or economic harm sustained by the complaining party as a result of non-compliance of the responding party during the RPT based on hard evidence.[57]

The arbitrators, in light of Article 22 of the DSU and precedents, noted that the suspension of obligation equal to or below the level of nullification or impairment would be considered consistent with Article 22, but punitive when applied in an exceeding manner.[58] Applying this standard to the present case, the arbitrators noted that the trade or economic effect suffered by the EC due to the 1916 Act has to be determined numerically or monetarily, and that since the mirror legislation of the EC could be applied to the US exports to the EC without limit,[59] the equivalency would not be ensured, thereby finding that the United States fulfilled its burden of proof on this point.[60]

(b) *Examination of the nature of the suspension of the obligations*

Article 22.7 of the DSU provides that the arbitrators shall determine the equivalency of the requested retaliatory measure, but not its nature. In this regard, the United States argued that the EC is asking the arbitrators to examine the nature of the measures for suspending obligations, by requesting the examination of the mirror legislation. Agreeing with the United States, the arbitrators viewed that the examination of the mirror legislation relates to the nature of the measure, and that it is out of their jurisdiction to determine the equivalency between the two measures, one being the mirror legislation which suspends obligations and the other being what caused the nullification or impairment, and hence declined to examine the mirror legislation. Then, the arbitrators moved on to determine the level of the nullification or impairment sustained by the EC under the 1916 Act so as to compare its level with that of the requested suspension of the obligations.[61]

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[57] Ibid., paras 5.13–5.16.

[58] Ibid., paras 5.21, 5.22.

[59] The Arbitrators illustrated the following hypothesis: WTO Member X exporting $10 billion worth of goods of WTO Member Y. Imposition of 10% *ad valorem* tax on all of the exports leads to the economic or trade impact worth $1 billion. When such a measure is found to be inconsistent with the WTO Agreement, X seeks to impose 10% *ad valorem* tax on all of the imports from Y, which is "qualitatively equivalent" measure (10% *ad valorem* tax). In such a case, if Y exports $100 billion worth of goods, the economic or trade impact will amount to worth $10 billion. In other words, the Arbitrators agree that "similar or even identical measures can have dissimilar trade effects" as the US argues.

[60] Ibid., paras 5.34–35.

[61] Ibid., paras 5.37–44.

(c) *The level of nullification or impairment sustained by the EC as a result of the 1916 Act*

According to the United States, the level of nullification or impairment sustained by the EC at the end of the RPT resulting from the 1916 Act is "zero," since no order was in place against EC products nor affected EC trade, and if by then the 1916 Act had been repealed, it would not have resulted in an increase in EC trade.[62] However, the EC argued that the United States owes the obligation to accept the conclusion of the Panel and the AB confirming that the 1916 Act has nullified and impaired benefits accruing to the EC. In addition, the EC argued that the level of nullification or impairment must be determined in relation to the direct or indirect benefits accruing to a WTO Member under the relevant Agreement, which includes not only the financial losses but also the deterrent effect from the 1916 Act.[63]

The arbitrators rejected the US argument by rendering the level of nullification or impairment to "something greater than zero" in light of the conclusions of the panels and the AB, but stressed that it is necessary to rely on "credible, factual, and verifiable information" as much as possible, when determining the level. The arbitrators then proceeded to the examination of the level in accordance with the prudent approach taken by earlier arbitrators to avoid claims that are "too speculative," "too remote" (*EC—Hormone (US)*; Article 22.6 arbitration), and "not meaningfully quantified" (*Canada—Aircraft Credits and Guarantees*; Article 22.6 arbitration).[64] In so doing, the arbitrators pointed to two parameters, which are the "final judgments under the 1916 Act (the amounts payable either after the appeals have been completed, or the appeal periods have expired that are made public readily verifiable)" and "settlements under the 1916 Act (disclosed, and that portions attributable to the 1916 Act could be confirmed)". However, they rejected as a parameter "deterrent or chilling effect" as too speculative and too remote in the present case. "Litigation costs" were not accepted as a parameter, either, due to lack of basis in the WTO Agreements, absence of any prior case permitting such a claim, and moreover, lack of clarity in which fees in what circumstances could be included.[65]

Applying these parameters in this case, the arbitrators found that final judgments under the 1916 Act could be included when they come out for a future calculation of the level of nullification or impairment sustained by the EC. As for the settlement under the 1916 Act, while the EC explained that the settlements among the entities of the EC and the United States were not disclosed due to their nondisclosure agreement, the arbitrators found that they could be included for EC's calculation if disclosed, and that this applies to future settlements as well, as long as determined by credible, disclosed information.[66] In essence, the award allowed the EC to suspend obligations

[62] Ibid., para. 5.45.
[63] Ibid., paras 5.47, 5.52.
[64] Ibid., paras 5.54–5.57.
[65] Ibid., paras 5.58–79.
[66] Ibid., paras 6.5–6.17.

under the GATT and the ADA on the condition that the level of such suspension would not exceed the level determined based on the parameters above.

The EC has not invoked the retaliatory measure since the issuance of the award. The terms of settlements the EC entities have agreed upon are yet to be disclosed, thus seemingly still rendering the EC unable to verifiably calculate the level of the retaliatory measure.

E. "Blocking legislation" of the EC

The Council Regulation (EC) No. 2238/2003, a so-called "blocking legislation," triggered the introduction of a similar legislation in Japan.[67] We will analyse Japan's blocking legislation in section III of this article, so before getting into the details, we will overview the EC's blocking legislation in this section.

1. *Overview of the EC's "Blocking Legislation"*

EC's blocking legislation is comprised of a preamble and four articles. The core of the legislation is Article 1 through Article 3 as well as the preamble that inscribes the background history of the legislation. The point of the entire legislation is, first, to prohibit recognition and enforcement within the EC territory of the judgments of the US courts on the 1916 Act ruling liability by the EC entities. Second, it enables the EC entities to bring a case against US entities within the EC territory to recover damages those entities suffered from lawsuits (hereinafter, the clawback provision).

Article 1 in essence provides that no judgment of a court or a tribunal and no decision of administrative authority based on the 1916 Act in the United States shall be recognized or enforced. Article 2 entitles EC entities to recover damages or costs incurred by them as a result of the application of the 1916 Act or by actions based thereon or resulting therefrom. Those that are entitled to recover are set out in Article 3 as (a) any natural person being a resident in the Community, (b) any legal person incorporated within the Community, (c) any natural or legal person referred to in Article 1(2) of Regulation (EEC) No. 4055/86,[68] and (d) any other natural person acting in a professional capacity within the community, including in territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State.

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[67] The Press Secretary/Director-General for Press and Public Relations of Ministry of Foreign Affairs, in his statement on the repeal of the 1916 Act on 4 December 2004 mentioned that Japanese government submitted a Bill similar to the EC's blocking legislation to the current extraordinary session of Parliament, recognizing the necessity of such a legislation also in Japan, and the Bill came into effect. This part of the statement appears immediately after the brief description of the EC's blocking legislation.

For the statement, http://www.mofa.go.jp/mofaj/press/danwa/16/dga_1204.html (in Japanese only)

[68] Article 1 of Regulation (EEC) No. 4055/86 states as follows:

"The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation."

Recovery under this legislation may be obtained as soon as an action under the 1916 Act is commenced (Article 2.2), claiming against those that originally brought a claim under the 1916 Act as well as any other relevant person or entity (Article 2.3). Such relevance will be determined by factors, as provided in Article 2.3 (a)–(d), including the status of business partner relationships, control relationships, and sharing employees.

The form of the recovery is prescribed in Article 2.4 as seizure and sale of assets held by the defendant who is a complainant in the US case under the 1916 Act. Assets subject to sale include shares held in legal person incorporated within the EC.

2. *Some Thoughts on the Blocking Legislations*

How to characterize the nature of the aforementioned blocking legislation in the WTO perspective is a difficult question. Japan wisely added an explanatory phrase, when referring to the status quo of the 1916 case in its White paper,[69] noting that such legislation is not a WTO-related measure, much less an inconsistent measure with the WTO Agreements. EC, as well, made a reference to the irrelevancy of her blocking legislation to the WTO Agreements in the press release.[70] However, these references rather cast doubts with regard to the relevance of the blocking legislation to the WTO regimes.

One may argue that such blocking legislations fall within the WTO scope as a retaliatory measure, and that the introduction of such legislation without the DSB authorization could be considered as unilateral that is prohibited under the DSU, namely Article 3.1 and Article 23.[71] Even if so, one could argue that the blocking legislation is a WTO-consistent regulation with a level equal to, or not exceeding the level of the nullification or impairment sustained by the original complainants, but only lacking the procedural formality, that is an authorization of the DSU. Following this line, however, if the legislation is another retaliatory measure, the question comes to whether a dual retaliation, the blocking legislation on the one hand and the mirror legislation on the other hand, is available to the WTO Member under the DSU. As we already discussed, Japan and the EC had already requested for authorization for their "mirror legislations" as a retaliatory measure against non-compliance of the United

[69] Ministry of Economy, Trade and Industry, *The 2005 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners*, pp. 21–22 (English version). Japan refers her blocking legislation as "Damage Recovery Act". She insists that the Act does not seek the "redress" in the meaning of Article 23.1 of the DSU, which is interpreted as "an action to restore the balance of rights and obligations that form the basis of the WTO Agreement" in *EU—Import Measures* (WT/DS165/R), thereby rendering the Act "not violat(ing)" such Article.

[70] European Commission, "WTO Arbitrators Agree on EU Request for Sanctions in Dispute over US 1916 Anti-Dumping Act" (No. 28/04), February 24, 2004. At the last sentence, she states that her blocking legislation "does not affect any obligations of the EU and therefore did not require authorization from the WTO".

[71] Antonis Antoniadis, "The European Union and WTO Dispute Settlement: in search of a normative framework for autonomous measures", EUSA Ninth Biennial International Conference Austin, Texas 31 March–2 April 2005, p. 24.

States. It could be said that if such a dual procedure is permitted under the DSU, the legal stability might be undermined.

Other than the DSU, one may view the rights conferred to private parties to bring lawsuits to recover their damages under the clawback provisions as "an actionable subsidy" within the meaning of the Subsidies and Countervailing Measures Agreement of the WTO.[72]

On the contrary, the blocking legislation could be considered to fall outside of the WTO perspectives on the grounds that it focuses on the litigations between the private parties, and that it does not fall into the "measures" of the WTO Members, which the DSU[73] intend to cover. Under such views, the purpose of the blocking legislation could be deemed just as a confirmation for a denial of recognition and enforcement of court judgments or decisions by administrative bodies that are in any case covered by their domestic civil laws. Therefore, the blocking legislation by necessity is not a suspension of concessions or obligations as defined in the DSU. Indeed, this seems to be the very view of Japan and the EC reflected in the phrases in the aforementioned policy publications.

The position of the arbitrators in this case is rather vague. They only found that the blocking legislation falls outside of their mandate for the procedural reasons that it was not referred in the EC's request for arbitration, and noted that the United States can bring the new proceedings under the DSU if the United States sees such legislation as exceeding the level of nullification or impairment.[74] The United States has not brought the claim in the WTO to this date, supposedly because the 1916 Act has been under the repeal process anyway.

III. A Critical Review of the Japanese Blocking Legislation (The Damage Recovery Law)

A. Summary of legislation

In light of the legal development in the WTO and the EC as examined in section II, we will now turn to Japan's reaction to the situation by reviewing her blocking legislation or a clawback law, as well as its policy implications stemming from the introduction of such a law.

In Japan, the draft of blocking legislation or a clawback law as a countermeasure to the US 1916 Act was prepared by the Government (The Ministry of Economics, Trade and Industry, METI). The draft of legislation was submitted to the National Diet and the law passed the National Diet in December 2004. This legislation is referred to as

[72] Ibid., p. 28.

[73] Article 4.4 and 6.2 respectively requires the identification of the "measure at issue" in case of request for consultation and establishment of the Panel.

[74] WT/DS136/ARB paras 3.19–3.29.

"The Damage Recovery Law". This law has a long formal title[75] and, for the sake of brevity, it will be referred to as "the Law" in this article.

In short, the Law allows Japanese enterprises to bring a law suit in Japanese courts against US enterprises (U.S. plaintiff) which successfully collected treble damage from the Japanese enterprise (Japanese defendant) in a US court under the 1916 Act. The amount recoverable by the Law includes the amount of money that a Japanese defendant had to pay to the US plaintiff by a US court order under the 1916 Act, the attorney fees and legal or other expenses incurred. Article 2 (1) of the Law defines the US 1916 Act to be the law in the United States which was the subject-matter of recommendation adopted by the WTO Dispute Settlement Body on 26 September 2000. The Law provides that a Japanese corporate entity has the standing to bring a suit under this law. According to Article 2 (2) of the Law, the standing is given to a corporate entity established according to Japanese laws, other organizations or a person who has Japanese citizenship.

Article 3 (1) stipulates that a US plaintiff who collected treble damages by a US court decision under the 1916 Act from a Japanese defendant and thereby caused damage to the Japanese defendant is liable to pay back to the Japanese defendant the amount thus collected plus interests. Article 3 (2) further states that, if the Japanese defendant incurred legal and other expenses in dealing with the law suit in the United States, the US plaintiff is liable to pay that amount to the Japanese defendant.

Article 3 (3) provides for a joint and several liability of a subsidiary of the US plaintiff. According to this provision, a person who owns 100 percent of stocks of the US plaintiff or who is a wholly-owned subsidiary of the US plaintiff is obligated to pay the above amount jointly and severally with the US plaintiff. This provision envisages a situation where a US plaintiff has no establishment such as branch but there is a wholly owned subsidiary of the US plaintiff in Japan. By holding this subsidiary jointly and severally liable, the enforcement of the Law would be easier than otherwise.

Article 4 of the Law is concerned with the statute of limitation, i.e., any claim under the Law expires after the lapse of three years from the time when the claim arose. Article 5 provides for courts in jurisdiction. According to this provision, any legal action as provided for in Article 3 can be brought to the court which has the jurisdiction on the Japanese defendant (the plaintiff in the Japanese proceeding under the Law). Article 6 states that any judgment of a foreign court under the 1916 Act cannot be enforced in Japanese courts.

Annex of the Law states that the Law expires when the 1916 Act is abolished except for the fact that the effect of the Law continues in respect to lawsuits which had been brought up before abolition of the 1916 Act.

[75] The formal title of this law is "The Law to Provide Special Measures for the Obligation to Return the Benefit Gained Under the 1916 Act in the United States of America and Related Matters".

B. Review of the Law

1. *Applicable Law*

The Law provides for recovery of damages sustained by a Japanese defendant by a court decision in the United States ordering the Japanese defendant to pay a treble damage caused to the US plaintiff because of an alleged dumping to the US market on part of the Japanese defendant. As touched upon later, an action by a Japanese defendant (the plaintiff in Japan) for the recovery of such damage is regarded as based on unjust enrichment or tort claim. Article 11 of the International Private Law[76] (a set of conflict rules) in Japan states that the applicable law for a claim based on unjust enrichment and tort is *lex loci delicti commissi* or the law of the place where the wrong was committed. However, in our situation, the wrong was committed in the United States since the US plaintiff brought a claim against the Japanese defendant in the United States and gained a judgment to collect a treble damage.

Therefore, according to the conflict rule mentioned above, it should be US laws (whether federal law or state law) which govern the dispute in the Japanese court in jurisdiction. However, if a US law applies to the situation here, it is certain that the Japanese defendant cannot recover any monetary damage sustained in the United States since the 1916 Act is a valid US law despite the fact that it was held as inconsistent with the WTO Agreements and a US law does not recognize the legal effect of WTO Agreements in the United States if there is any conflict between US law and WTO law. In the above situation, Japanese courts will probably invoke Article 33 of the International Private Law which stipulates that the applicable foreign law is not applied if, by such application, the public order of Japan is injured.[77]

2. *A Question About the Scope of Application*

As mentioned above, the Law is invoked only against a grant of damage awarded under the 1916 Act. However, the Law may be easily circumvented because the United States may enact a new law which authorizes similar actions, or existing US laws such as antitrust laws may authorize similar legal actions.[78] In light of this, the Japanese

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[76] *Horei* (Law 10, 1899). *Horei* can be translated as: "The Law on Application of Laws". Article 11 of *Horei* states: "The legal effect of claim regarding management of affairs without mandate, unjust enrichment or tort shall be determined in accordance with the law of the place in which the fact which has given rise to that claim occurred."

[77] Article 33 of *Horei* states: "In situations in which a provision of a foreign law applies, that provision of the foreign law does not apply if, by applying this provision, the public order or good moral in Japan is injured."

[78] For example, Section 2 of the Sherman Act may apply to a predatory pricing exercised internationally, e.g., by maintaining a high price in the country of exportation and lowering export price to the United States below the cost of production using extra-profit in the domestic market. This situation is similar to dumping covered by the 1916 Act. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 US 574 (1986); Antitrust Enforcement Guidelines for International Operations (issued by the US Department of Justice and the Federal Trade Commission, April 1995), p. 8 *et seq.*

government could have adopted a legislation which generally authorizes relief against a foreign law which is inconsistent with international treaties or conventions or which injures the trading interest of the country seriously.

Article 2(2) of the Law provides that only a Japanese corporate entity, an organization or individual who has Japanese citizenship is entitled to bring a claim based on the Law. This means that the standing to bring a suit under the Law is based on the nationality principle. A question arises as to the nature of interest that the Law seeks to protect, i.e., whether it is aimed at protecting "Japanese enterprises" or the export interests of the country. The 1916 Act would apply not only to a Japanese enterprise but also to an enterprise of any nationality as long as it is engaged in dumping from Japan to the US market. For example, a foreign company establishes a branch in Japan and, through this branch, sells domestically and also exports products to the United States. If dumping occurs, the foreign company or its branch can be subject to a challenge under the 1916 Act. Even if a treble damage is collected from this company under the 1916 Act in the United States, this company is not eligible to bring a claim on the basis of the Law against the US plaintiff in Japan since it is not a Japanese company.

However, a foreign company contributes to the export interests of Japan as long as it is engaged in export from Japan through, for example, the use of ports and warehouses, export insurance and employment of persons in connection with the export. There could have been a different legislative policy under which any enterprise (whether domestic or foreign) which is engaged in export from Japan to the United States is entitled to bring a suit in Japan against a US plaintiff when it is ordered by a US court decision to pay a treble damage to the US plaintiff under the 1916 Act.

However, a Japanese enterprise is entitled to bring a suit under the Law if it is engaged in export from a foreign country to the United States as long as the enterprise operates as a Japanese enterprise in that foreign country without establishing a foreign subsidiary. This seems to raise a policy question. It seems that whether to allow a countermeasure to any action against invocation of the 1916 Act to alleged dumping from that country to the United States belongs to the realm of policy decision of that country and Japanese courts should not lightly intervene into this field.

3. *Should a Claim to Recover the Amount Paid under the 1916 Act be Regarded as the Recovery Based on a Bad Faith Unjust Enrichment?*

Article 3 is the core of the Law and consists of three parts, e.g. the obligation on the part of a US plaintiff which collected a treble damage under a US court decision from a Japanese defendant (a) to pay back to the Japanese defendant the amount collected from the Japanese defendant (Article 3(1)), (b) to compensate the Japanese defendant the amount incurred by the execution of litigation in the United States such as legal expenses including attorney fees (Article 3(2)), and (c) the joint and several responsibility of the Japanese subsidiary of a US plaintiff.

Article 3(1) stipulates that a US plaintiff which has gained a treble damage at a US court under the 1916 Act must pay back that amount with interests to the Japanese defendant. The nature of this obligation is considered to be that of returning the benefit of unjust enrichment. Unjust enrichment is defined in Article 703 of the Civil Code as "Any person who has benefited by the property or services of another person without a legal reason and caused damage to that person is obligated to return the benefit to the extent that the benefit still exists." Article 704 of the Civil Code provides for unjust enrichment of a bad faith beneficiary by stating that "A bad faith beneficiary must return the gained benefit with interests". "Bad faith" signifies that a person who benefits from a property or services of another person knows or should have known that the benefit is without any legal basis.

Regarding the nature of obligation under the Law, an official of the METI (The Ministry of Economics, Trade and Industry) who was engaged in drafting the Law explained as follows:

> While the payment by an order under the 1916 Act can be considered to be without a legal cause for the reason that the 1916 Act is in violation of the WTO Agreement, it is hard to imagine that US enterprises engaged in international business are unaware of the fact that the Dispute Settlement Body of the WTO handed down a judgment that the 1916 Act is inconsistent with the WTO Agreement. US enterprises intending to bring suits under the 1916 Act usually consult with trade lawyers and it belongs to common sense among trade lawyers that this Act is contrary to the WTO Agreement.[79]

What this statement is purported to stress is that a US enterprise which brings a claim in the United States on the basis of the 1916 Act is in bad faith in the sense that it knows an inconsistency of the 1916 Act with the WTO Agreement and, therefore, should be treated as such in litigation under the Law.

The Law authorizes a Japanese defendant to recover expenses including legal and other fees incurred during the process of litigation under the 1916 Act in the United States. Such expenses cannot be considered as unjust enrichment on the part of the US plaintiff because the US plaintiff does not benefit from them. Although not specifically explained, the nature of this claim is regarded as a tort claim. Article 709 of the Civil Code which provides for tort claim states that: "Any person who has caused damage to another person intentionally or by negligence is liable to pay the damage". Therefore, there is a similar problem of how to explain the nature of claim with regard to the recovery of such expenses.

The above explanation maintains that the Law is *lex speciales* in relation to the Civil Code and the nature of legal claim according to the Law is akin to that of the Civil Code. However, the validity of this legal construction is questionable for the reason that, while the WTO Agreement is regarded as an international treaty and is above

[79] Takashi Hirose, *Damage Recovery Act concerning the US Anti-Dumping Act of 1916*, Journal of the Japanese International Business Law (Kokusai Shoji Homu), Vol. 32, No. 12 (December 2004), pp. 1593–1599, Vol. 33, No. 1 (January 2005), pp. 25–35 (this article is in Japanese).

domestic laws in Japan,[80] the WTO Agreement is nothing but an executive agreement in the United States and has no superior power over domestic laws in the United States. Moreover, Section 102(a) of the Uruguay Round Agreements Act which implemented WTO Agreements in the United States explicitly states that, in the event of conflict between an existing US federal law and a provision of a WTO Agreement, the provision in the WTO Agreement cannot be given legal effect.[81] When a US plaintiff brings an action under the 1916 Act in the United States, it brings a suit in the context that the 1916 Act is valid and enforceable in the United States. Therefore, it seems inappropriate to attribute a subjective or personal liability factor to the US plaintiff in the sense of bad faith and hold the US plaintiff liable in Japanese law for that reason.

A more persuasive legal explanation of the nature of the Law would be to state that the legal liability of a US plaintiff is based on absolute liability or no-fault liability. A government can enact a law designed to accomplish a policy objective and, to accomplish this objective, create absolute civil liability or no-fault liability of individuals. Examples of absolute liability or no-fault liability in Japan are found, *inter alia*, in the Nuclear Energy Law, the Mining Law, the Anti-Air Pollution Law, the Anti-Water Pollution Law, the Labor Law and the Antimonopoly Law. It provides for the promotion of the nuclear energy industry and enterprises engaged in this industry are responsible to pay the whole damage caused by accidents regardless of whether there is negligence or not on the part of a nuclear energy enterprise in which premise accident occurred. In this instance, an absolute or no-fault liability is used to promote the governmental policy to promote the safety of nuclear energy and provide for the security of the people.

Likewise it is an important trade policy of the Japanese government to maintain the multilateral trading system as expressed in the WTO regime. For this purpose, it is important to secure the observance of WTO Agreements by WTO Members. To promote this policy, the Government is entitled to enact a law to take a countermeasure to a measure of other Member which violates WTO Agreements. From this viewpoint, the government can enact a law which authorizes courts to grant relief to Japanese enterprises which had to pay a treble damage in the United States under a US law which had been held as inconsistent with the WTO Agreement. The Law incorporates this trade policy and provide for relief to Japanese victims which were subjected to the 1916 Act in the form of the right of recovery. Here what matters is not a subjective responsibility on the part of a foreign enterprise as bad faith or negligence but a Japanese governmental policy to discourage suits in the United States under the 1916 Act. A

[80] Article 98, para. 2 of the Japanese Constitution states that: "Treaties that Japan has concluded and the established rules of international law shall be faithfully observed".

[81] Section 102 (a) of the Uruguay Round Agreements Act which is entitled as "Relation to the Agreements to United States Law and State Law" states that "(1) United States Law To Prevail In Conflict No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." See, for details, Uruguay Round Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements: Message from the President of the United States (24 September 1994), 103d Cong, 2d Sess., House Document 103–316, Vols 1–2.

person can be held liable even if there is no bad faith in the conduct in question if it is necessary for that policy reason. The above rationale seems to make more sense rather than a constructed or fictitious bad faith on the part of a US enterprise which brought a suit in the United States.

4. *Joint and Several Liability of the Subsidiary*

Article 3 (3) of the Law provides for a joint and several liability of a subsidiary of a US plaintiff by providing that a corporate entity which owns all of the stocks of the beneficiary of the 1916 Act or a corporate entity of which all of the stocks are owned by the beneficiary is jointly and severally liable to pay back the amount of the benefit and indemnify the damage. This is a device to increase chances for securing enforceability of an order of a Japanese court under the Law to grant to the Japanese defendant the recovery of benefit and damage. US plaintiffs may have no establishments in Japan and this makes the enforcement of the Law difficult. This provision is an example of application of the "piercing corporate veil" doctrine. The doctrine of piercing corporate veil signifies that when two corporate entities are separate and independent only in form but act together in substance and functionally integrated, the separateness of corporate entity can be disregarded and these two corporate entities can be treated as a single entity. Therefore, a subsidiary of a US plaintiff has a subrogate responsibility for conducts of the parent.

However, there is a loophole in this provision. Article 3 (3) of the Law requires that 100 percent stocks of a subsidiary be owned by a US plaintiff in order for the subsidiary to be covered by Article 3 (3). When a suit under the Law occurs or a suit is imminent in Japan, the US plaintiff, a prospective defendant in the Japanese proceeding, can dispose of a portion of the stocks of the subsidiary it owns and then the subsidiary is not any more qualified as an entity covered by Article 3 (3) of the Law.

5. *Court in Jurisdiction*

Article 5 of the Law states that a legal action on the basis of Article 3 of the Law can be brought to the court which has the jurisdiction on the plaintiff (the Japanese defendant in US court proceeding under the 1916 Act). Normally the court in jurisdiction is the court which has the jurisdiction on the residence of the defendant.[82] Article 5 of the Law is a deviation from this jurisdictional principle in that it gives the jurisdiction to the court in which the Japanese plaintiff resides. In this respect, the

[82] Article 4, para. 1 of the Civil Procedure Code states that: "A claim belongs to the court which has the jurisdiction on the place in which the defendant resides".

jurisdictional rule is somewhat anomalous.[83] The legislative intent was that the Law anticipates that, in many instances, US plaintiffs (defendants in the Japanese proceeding under the Law) have no residency in Japan and, for this reason, gives Japanese enterprises intending to bring actions to come forward to the courts which have jurisdiction over the Japanese plaintiffs, i.e., their residency. However, if a subsidiary of a US plaintiff which is a Japanese corporate entity is made the defendant in a proceeding under the Law, the regular rule of the Civil Procedure Code should apply and the court in jurisdiction should be the court which has the jurisdiction on the residency of the defendant.[84]

6. *Non-recognition and Non-enforcement of US Court Decision Under the 1916 Act*

Article 6 of the Law declares that a judgment against a Japanese defendant rendered in a US court has no legal effect in Japan. This is a provision for non-recognition and non-enforcement of a US court decision granting the recovery of a treble damage to a US plaintiff which is contrary to the WTO Agreement. This relates to Article 118 of the Code of Civil Procedure in Japan which states that a foreign judgment cannot be recognized and enforced if it is contrary to the public order and good moral in Japan. The question here is whether or not a judgment in the United States based on the 1916 Act granting the recovery of a treble damage is contrary to the public order in Japan.

The Japanese Supreme Court handed down a decision to the effect that a US judgment which granted the recovery of multiple damage is contrary to the public order in Japan in so far as it grants the recovery of damage in excess of actual damage sustained by the plaintiff.[85] It follows from this Supreme Court decision that a judgment of a US court granting the recovery of a treble damage under the 1916 Act is contrary to the public order in so far as it grants the recovery of damages above the amount that the plaintiff has actually sustained, e.g. that part which is in excess of the actual damage. It further follows that the decision of the US court granting the recovery of damages is recognizable and enforceable with regard to the part which is equal to the actual amount of damages sustained.

One might argue that the 1916 Act is held as inconsistent with the WTO Agreement which incorporates "the international public order", that this international public order is incorporated in the Japanese public order and that any decision of a foreign court which is contrary to the international public order is not recognizable in Japan for this reason. However, at this development of international law, any principle

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[83] This may raise the issue of *forum non-convenience*. See, e.g. *Asahi Metal Indus. Co. v. Superior Court*, 480 US 102 (1987).

[84] See note 8, *supra*.

[85] Decision of the Supreme Court, 11 July 1997, Minshu (Supreme Court Civil Cases Reporter), Vol. 51, No. 6, p. 2573 *et seq*. A summary of this decision in English is found in The Japanese Annual of International Law (1998), No. 41, p. 104 *et seq*. For details of the enforcement of foreign judgments in Japan regarding business activities, see Nozomi Tada, Enforcement of Foreign Judgments in Japan Regarding Business Activities, The Japanese Annual of International Law (2003), No. 46, p. 75 *et seq*.

in international law cannot be regarded automatically as a domestic rule. Therefore, this argument is probably too speculative and premature. The framers of the Law simply wished to override the limitation of Article 118 of the Civil Procedure Code and make sure that no part of a judgment of a US court under the 1916 Act granting the recovery of the damages sustained by a US plaintiff is recognized and enforced in Japan.

IV. Conclusion

The Law is destined to be short-lived because it will expire when all of the pending suits in the United States against Japanese companies are finished. However, it is the first time that the Japanese government enacted a blocking statute or a clawback statute as a countermeasure to a foreign law which is inconsistent with the WTO Agreement. The Law may be an important precedent in the Japanese trade policy and may indeed signify a shift of trade policy toward "aggressive legalism".

Exhibit 15-1

said jurisdiction agreement which is not against the spirit of International Maritime Transportation Law should be held as not being against public policy and good morals.

(5) In view of the foregoing, there is no legal ground to hold null and void at least that part of the said jurisdiction agreement concerning suits to be brought by shippers against the Defendant, so said jurisdiction provision was validly executed between the Defendant and the Institute so far as said part is concerned.

4. The Scope of the Effect of the International Exclusive Jurisdiction Agreement in the Instant Case.

The Plaintiff brought this suit demanding compensation for damages, arguing that the Plaintiff, insuren, as subrogator was entitled to the claim for damages for the destruction of the cargos that Nanyo Bussan, which the consignee of said bill of lading from the sender Institute, was entitled to. Therefore, this Court now renders its decision on whether or not the effect of said international jurisdiction agreement applies to this suit.

Firstly, the rights which the Plaintiff claims as the subject of this suit concurrently consist of, first, the claim for compensation for damages due to non-performance of the duty of the Defendant under said transportation agreement and, second, the claim for compensation for damages due to tort. It follows from the interpretation of said jurisdiction agreement that a suit maintaining the former claim as well as a suit maintaining the latter claim is a suit subject to said international exclusive jurisdiction agreement.

Secondly, this Court considers whether or not the effect of said international jurisdiction agreement between the Defendant and the Institute binds the Plaintiff. An agreement of international jurisdiction is an agreement concerning a suit. However, so far as the parties can freely determine the legal matters which are agreed to be the subject of such agreement, the effect of such agreement is interpreted to bind the successor of said legal matters.

Anything can be freely indicated in a bill of lading except matters restricted under the International Maritime Transportation Law, and the contents of covenants under the transportation agreement and a bill of lading are to be freely determined by the parties thereto. Therefore, this Court is of the opinion that the effect of said international exclusive jurisdiction agreement binds the Plaintiff.

5. Accordingly, the jurisdiction of the Japanese courts over this suit is precluded by said international exclusive jurisdiction agreement, and the suit filed with this Court is improper. Hence, this Court dismisses this suit and renders a judgment to the effect of text of the Judgment, above, applying Article 89 of the Code of Civil Procedure.

(Judges: Yoshio Murakami, Takashi Morimoto and Naoyuki Kuroda)

TOKYO DISTRICT COURT, APRIL 26, 1965*

Private International Law—Labor Contract—Although personal services agreement between American pilot and American air service company stipulated U.S. law, where services were rendered by employee in and employee was dismissed in Japan, as a matter of public policy the contract and the effects of dismissal will be interpreted according to Japanese law.

PETITIONER:

Name: Frank S. George.
Nationality: The United States of America.
Address: No. 17, Kogai-cho, Azabu, Minato-ku, Tokyo.

ATTORNEYS FOR THE PETITIONER:

Michael A. Braun, Hiroshi Kawajima.

RESPONDENT:

Name: International Air Service Company Limited.
Representative: William R. Rivers.
Nationality: The United States of America.
Address: Operation Center of The Japan Air Lines, Limited, Tokyo International Air Port, Edomi-cho, Haneda, Otaku, Tokyo.

ATTORNEY OF THE RESPONDENT:

Franklin E.N. Warren.
Sub-Attorney of the Respondent: Shigeo Oshima.

Concerning the Case No. (*Vo*) 2237-1964 between the above-mentioned Petitioner and Respodent concerning a petition for provisional disposition for maintenance of position, the Court orders as follows:

TEXT OF THE ORDER:

The Respondent shall provisionally pay the Petitioner the amount of ten thousand two hundred and sixty dollars ($10,260).

The expense of the petition shall be borne by the Respondent.

* *The Hanreijiho* (Judicial Reports) (408) 14 (June 11, 1965).

REASONS FOR THE ORDER:

The facts found by the Court based upon the explanatory materials produced by the Petitioner and the Respondent, and the legal judgment made by the Court on the basis of such fact-finding, are as follows:

I. The Process Resulting in Dismissal, etc.

The Respondent International Air Service Company Limited (hereinafter called the "Respondent Company") is a corporation organized under the laws of the State of California, U.S.A., has its head office at 1299 Bayshore Highway, Burlingame, California, and is mainly engaged in supplying crewmen to air line companies or air transporters of various countries. It is now supplying fifty-two (52) crewmen, in total, to Japanese domestic air line companies or air transporters, namely, forty-five (45) to Japan Air Lines Limited (hereinafter called "JAL") and seven (7) to Japan Domestic Air Lines Limited (hereinafter called "JDAL") (total number of the crewmen presently supplied by the Respondent Company to various countries including Japan amount to one hundred and fifty-five (155), and its business of such supply is conducted at its office established in the Operation Center of JAL, Tokyo International Airport, Edomi-cho, Haneda, Otaku, Tokyo. The Petitioner was employed by the Respondent Company on April 1, 1960 as a planemaster for a period of one (1) year, which period has been extended to date. The agreement concluded by the Respondent Company and the Petitioner involves, among others, a provision that he would be assigned to JAL during the term of the agreement, and also a provision that his claims concerning death and all kinds of diseases and injuries incurred by him in the course of, and in connection with, the exercise of his business even during the period of being assigned to JAL, would be settled in accordance with the Workmen's Accident Compensation Law of California, and he has been working as a planemaster of domestic lines of JAL since the beginning of 1961, when he was sent to JAL pursuant to the said provision.

On April 1, 1964, the Respondent Company established a seniority system with respect to the assignment of planemasters and engineers to JAL and, at the same time, it entered into an agreement with JAL containing the following matters (hereinafter called the "Agreement"):

1. Thereafter, JAL would have the authority to control the acts of the crewmen assigned to JAL by the Respondent Company, and supervise, instruct and control such crewmen, in the exercise of their business, *provided*, however, that the Respondent Company might substitute a crewman already assigned to JAL with another or replace a crewman for another, during the period of their respective assignments, in accordance with its seniority system, subject to the prior consent of JAL;

2. In case of any complaint from crewmen, the Respondent Company would be responsible for the settlement thereof if such complaint related to terms of employment or working conditions, and the representatives of both companies would make their best efforts to settle such complaint if the complaint related to interpretation of the Agreement.

The provision with respect to terms and conditions of employment in the said Agreement was deemed to constitute a part of the Labor Agreement between the Petitioner and the Respondent Company when the said Labor Agreement was renewed on April 1, 1964. On September 11, 1964, the Petitioner made a complaint in writing to James C. Jack, the manager of Tokyo Office in charge of planning and the chief of foreigners' business, of the Respondent Company, that the Respondent Company neglected the seniority right of the Petitioner which was one of the terms and conditions of the aforementioned Labor Agreement, by recommending to JAL as crewmen of jet liners, Charles Dietlich and William Bowers who were subsequent to the Petitioner in the seniority list, to promote their positions. However, the complaint was rejected by the Respondent Company. Moreover, since there were many other planemasters who thought that the said recommendation and promotion were made quite regardless of their seniority rights and there were also those planemasters who complained that the Respondent Company neglected the seniority system, the Petitioner formed a "Temporary Employees Committee" (hereinafter called the "Temporary Committee") with Albert Guinser and John Sottalery, who were prior to the Petitioner in the seniority list among the employees of the Respondent Company assigned to JAL, to talk with the Company about the selection of crewmen to be assigned to the jet liners. On September 21, 1964, they notified H. Odagiri, a person in charge of foreign operation center of JAL, of the above-mentioned complaint, and proposed that the selection of crewmen for the jet liners should be postponed until the complaint would be treated in accordance with the Agreement, because the aforementioned promotion of some employees to the crewmen of jet liners which was made in complete negligence of the existence of many others who had prior seniority rights, was not in conformity with the practice of the seniority system maintained by the Respondent Company and the spirit of the Agreement between JAL and the Respondent Company. At the same time, the Petitioner distributed circulars in the name of the Petitioner among the crewmen of the Respondent Company assigned to JAL, and informed them that—

1. He had made complaints to the Company that it neglected the seniority system, and notice of the complaints had been given to officials of JAL;

2. He had formed the Temporary Committee with Guinser and Sottalery to protest the acts of the Respondent Company, and had arranged a meeting with James C. Jack who had the above-mentioned post in the Respondent Company;

3. Upon this opportunity, crewmen should be elected in more appropriate manner.

On October 3, 1964, these three members of the Temporary Committee consulted with Jack concerning the way in which the foreign engineers would be elected the jet liners' engineers, the appropriate retirement age of engineers of the Respondent Company, etc., and reached the agreement with him that the Respondent Company and a committee representing employees of the Company (namely, a committee consisting of three members who would be elected from the six candidates comprised of three members of the Temporary Committee and the three others eliminated from among the employees of the Company) would have periodical meetings to concern about labor conditions, and any agreement

which might be reached as a result of such meeting would be submitted to the meetings of the Board of Directors of the Respondent Company for its approval. On the fifth day of the same month, the Petitioner, as the chairman of the Temporary Committee, sent the following documents in the name of the Temporary Committee to all the crewmen of the Respondent Company, namely, 1) a document reporting that the above-mentioned agreement was made as a result of consultation with the Respondent Company, and requesting elections for the determination of the three candidates as members of the committee representing employees; and 2) ballots of the election for the determination of the candidates for the members of the committee representing employees (the ballots contained not only the remark that they should be sent back to the Petitioner after the names of a candidate being filled in, but also the column to answer whether or not they would agree to the idea of forming a labor union to represent the employees if the management would not admit the establishment of the committee representing the employees, which column was accompanied by the statement that it was illegal in Japan as well as in the U.S.A. to prevent the employees from uniting for the purpose of collective bargaining).

Meanwhile, on September 28, 1964, R. Henderson, the acting chief pilot of the Respondent Company, ordered the Petitioner to submit a document of detailed explanation concerning the document which the Petitioner sent to Odagiri of JAL on September 21, and, the document being submitted by the Petitioner on October 3, the Respondent Company sent the Petitioner a written notice dated October 7 to dismiss him as of October 30, which notice was received by the Petitioner on October 10. The said notice says that the reason for the dismissal is that the Petitioner acted against the interest of the Company and its employees assigned to JAL, by sending the above-mentioned document to Odagiri of JAL on September 21, and by using stationery of the Company without permission for preparing the said document.

The salary to be paid to the Petitioner by the Respondent Company as of the time of the dismissal was U.S.$1,710, consisting of U.S.$1,440 as principal salary and U.S.$270 in various allowances. However, no salaries have been paid since October 1, 1964.

Incidentally, the Petitioner brought an appeal to the Eighth Local Division of the Federal Labor Relations Board of the United States on December 14, 1964, asserting that the dismissal of the Petitioner by the Petitioned Company constituted an unfair labor practice, which appeal was rejected by an official in charge of the local disputes of the Federal Labor Relations Board on January 21, 1965.

II. Effect of Dismissal and Claims to be Preserved.

The Petitioner asserts that "since the dismissal of the Petitioner constituted unfavorable treatment for the purpose of interrupting preparation by the Petitioner of the organization of a labor union, and the reasons for dismissal given by the Respondent Company are merely ostensible, the dismissal is null and void because of a violation of the provisions of Article 7, Item 1 of the Labor Union Law." On the contrary, the Respondent Company asserts as follows: "(1) This case is not subject to the jurisdiction of the Japanese courts because the Respondent Company has no office, place of business, or any person in charge of its business in Japan. (2) Even if it is subject to the jurisdiction of the Japanese courts, effect of the dismissal should be considered in accordance with the laws of California, because the dismissal relates to the Labor Agreement. (3) Even if the effect of the dismissal is to be considered in accordance with Japanese law, the dismissal is effective since it was made for the reason of 'breach of the Agreement, especially an act of grave misconduct,' by the Petitioner who arbitrarily engaged in direct negotiation with JAL with respect to the treatment of complaints, and for no other reasons whatsoever. (4) Even if the dismissal should be invalid, the Petitioner cannot claim payment of wages for the period following December 1, 1964, since the Labor Agreement between the Petitioner and the Respondent Company was terminated as of November 30, 1964, because the Petitioner was subsequent to others in the seniority list at the time when the number of the planemasters to be assigned to JAL under the Agreement between JAL and the Respondent Company was decreased twenty-three (23) as of December 1, 1964."

The court will consider these points *seriatim* in the following:

1. Jurisdiction

It goes without saying that a corporation organized under the laws of a foreign country is subject to the jurisdiction of the Japanese courts if it has offices in Japan and is engaged in business in Japan. Article 4, paragraph 3 of the Code of Civil Procedure should be construed to presuppose this conclusion. Accordingly, the assertion of the Respondent Company that the Japanese courts have no jurisdiction over it, cannot be supported, since, as discussed above, the Respondent Company is doing business at the present office first above-written, by offering fifty-two (52) crewmen to Japanese air line companies. Since the said office must be regarded as a "place of business in Japan" as provided for in Article 4, paragraph 3 of the Code of Civil Procedure, the Respondent Company has the general forum there, and this petition of provisional disposition is subject to the jurisdiction of this Court which has jurisdiction over the district of the said general forum of the Company. Incidentally, the fact that the Petitioner brought an appeal before the Local Division of the Federal Labor Relations Board of the United States does not affect this judgment.

2. Applicable Law

With respect to the Labor Agreement, the Court considers that the both parties have selected, as the applicable law, either the federal laws of the United States or the laws of the State of California, since the Agreement was concluded, (1) in California, the United States, between the Respondent Company, a corporation of the State of California, and the Petitioner, a national of the United States, and (2) on the condition that the Petitioner should have his domicile in the United States, or its territories, dominions or its surrounding islands during the

term of the Agreement, "in order to avoid a jurisdiction of any government other than that of the Unites States concerning labor conditions." However, the declaration of intention of the dismissal was made by James C. Jack, the manager of Tokyo Office in charge of planning and the chief of foreigners' business, of the Respondent Company, to the Petitioner who resides in Minato-ku, Tokyo, was assigned to JAL pursuant to the Labor Agreement, and has been working as a planemaster of its domestic airliners in accordance with the instructions of JAL. Under such circumstances, although the dismissal relates to the Labor Agreement, the effect of such dismissal must be considered in accordance with the labor laws of Japan where the labor is actually supplied, and the provision of Article 7 of the Law Concerning the Application of Laws in General [Horei] should not be applied so far as this matter is concerned. The reason is that, since labor laws regulating labor relations do not have a nature which is common to different nations, contrary to the general private laws which also regulate contract relations between management and labor, and each nation intervenes, from its own necessities, in labor agreements by which labor is actually supplied in said country, to restrict or regulate the freedom of conclusion of labor agreements in different ways, the Court believes it reasonable to construe that, if the labor is actually supplied in Japan on a continuous basis as seen in the present case, the principle of freedom to designate an applicable law as provided for in Article 7 of the Horei is restricted by the labor laws containing a public policy which has only a limited territorial effect.

3. Now, the Court will consider the effect of dismissal in the light of the public policy contained in Article 7, Item 1 of the Labor Union Law. The reason for the dismissal given by the Respondent Company is that "the Respondent Company assigned to JAL as well as the Respondent Company by using papers of the Company without its consent, and by negotiating directly with JAL, a customer of the Respondent Company, to give JAL the impression that the Respondent Company itself would request that the air crewmen of the Respondent Company be promoted to jet crewmen." However, although it might be a little imprudent of the Petitioner to have used the stationery of the Respondent Company for writing the letter to JAL, without its consent, there was no fear whatsoever that the letter might cause the misunderstanding that the request was made by the Respondent Company itself, because (1) the letter was written in the name of the Petitioner to inform JAL that "the complaint had been made to the Respondent Company", and (2) it only proposed to JAL to postpone an election of jet crewmen until the complaint was treated in accordance with provisions of the Agreement between the Respondent Company and JAL. Moreover, in view of the fact that the complaint had not been accepted by the Respondent Company for about ten (10) days after September 11, 1964, it would not be conceivable that the Petitioner's act of making the said proposal to JAL and his act of requesting its cooperation would necessarily result in impairing the interests of the Respondent Company and its employees; nor is there evideuce which would prove such a fact. On the other hand, the Court has found the following facts: (1) Although the dismissal is pretended to have been made after an explanatory statement had been submitted to the Respondent Company by the Petitioner on

October 3, 1963, which explanatory statement was demanded by Henderson, the acting chief pilot of the Respondent Company, on September 28 of the same year, in fact the dismissal was made in accordance with instructions given by William R. Rivers, a representative director of the Respondent Company, on September 19, namely, before the submission of the explanatory statement by the Petitioner. (2) Although the above-mentioned Jack, receiving from the Petitioner on September 21 a request to have a meeting with the Temporary Committee, promised to have the meeting around the 23rd of the same month, he went to San Francisco where the representative director Rivers was working, and the said instruction was given while Jack did not fulfil the promise after his return to Japan. (3) When Jack started for San Francisco, he had a fear that the Petitioner might form a labor union with crewmen of the Respondent Company. Taking all these facts into consideration, the Court considers it reasonable to conclude that the said instruction and the dismissal based upon it were made for the purpose of interfering with preparations to establish a labor union. Therefore, the dismissal is null and void because of its conflict with the public policy contained in Article 7, Item 1 of the Labor Union Law.

4. The Labor Agreement between the Petitioner and the Respondent Company was renewed on April 1, 1966, and the new effective term was determined to be a period of twelve (12) months thereafter, during which period the Petitioner would work as a planemaster, unless immediately terminated in accordance with the terms and conditions set forth in the Agreement between JAL and the Respondent Company. The Respondent Company asserts that the Agreement was terminated on November 30, 1964. However, the Court cannot find any evidence supporting such assertion. Accordingly, the Labor Agreement between the Petitioner and the Respondent Company continued until the last day of March, 1965, in spite of the declaration of intention by the Respondent to dismiss the Petitioner. Therefore, the Petitioner has wages receivable from the Respondent in the sum U.S.$10,260 in total, consisting of U.S.$8,640, six months' basic wage for the period between October 1, 1966 and March 31, 1966, and U.S.$1,620, six months' allowances for the same period, since the said sum can be obtained based upon such amount of basic wage and allowances as of the date of declaration of intention as are referred to in I above.

Incidentally, as aforementioned, the parties to the Labor Agreement selected as the applicable law either the federal laws of the United States or that of the State of California. However, it would not be necessary to look into the intention of the parties as to which of these laws they selected, since, in any event, a labor agreement gives an employee the right to receive wages from an employer. Moreover, although it is not entirely clear to the Court whether the Petitioner can sue directly for the payment of wages under each of the aforementioned laws, in case the Respondent Company is in default of performing its obligation, the Court is of the opinion that the laws of Japan, where the litigation is instituted, should govern with respect to (1) the possibility of suing for the performance of a contractual obligation of an obligor who is in default of such performance and (2) the procedures to preserve the right of an obligee. Since it goes without saying that the wage is a claim the direct performance of which

can be sued for under Japanese law, it is qualified as a claim to be preserved by provisional disposition.

III. Necessity of the Provisional Disposition.

1. Since the Petitioner has not received the wages of the aforementioned amount since October 1, 1964, and since it is self-evident, in the light of the facts as found above, that the non-payment of the wages will cause a great difficulty to the life of the Petitioner, the Court thinks that there is an emergent necessity for the Petitioner to preserve the right by this provisional disposition.

2. The Respondent Company asserts that there is no necessity of the provisional disposition, since, even if an order of provisional disposition is issued, such order will not be enforced because the Respondent Company has no assset in Japan. However, the necessity of the provisional disposition cannot be denied merely because of the non-existence in Japan of the assets which can be the object of enforcement, so long as there is a possibility of voluntary performance of the order.

IV. Conclusion.

Thus, the Court is of the opinion that the petition requesting the provisional disposition is well grounded. Accordingly, the Court grants the provisional disposition without security being furnished, and renders its decision as stated in the text by applying Article 89 of the Code of Civil Procedure with respect to the expenses of the Petition.

Dated: April 26, 1965.

Tokyo District Court, the 19th Civil Division:

Presiding Judge Justice, Toshioki Kawazoe. Justice Hidenobu Sonohe. Justice Yoshisada Matsuno.

Hague Convention provision prohibiting confiscation of private property is merely declaratory of customary international law.
International Law—Customary international law may be overriden by particular agreements, except where such agreements are contrary to internationally accepted standards of public order and good manners.
Instrument of Surrender—The Instrument of Surrender of Japan and Orders thereunder authorizing the confiscation of private property, are not contrary to international law.

DESIGNATION OF CASE:

Decision of the Tokyo District Court, February 28, 1966, Case No. 8, 428 (*wa*) of 1959.

PLAINTIFF:

Tokyo Suikosha (Juridical Foundation).

DEFENDANTS:

Tokyo Masonic-Lodge Association.
Tokyo Masonic Association (Juridical Foundation).

ASSISTANT INTERVENER FOR DEFENDANTS:

The State (Japanese Government).

JUDGMENT:

1. All the claims of the plaintiff are dismissed on the merits.
2. The costs of litigation shall be borne by the plaintiff.

FACTS:

I. Claims of the plaintiff.

The attorneys for the plaintiff seek the following judgment, and a declaration of provisional execution as to para. 1:

1. It is confirmed that the plaintiff owns the immovable listed on the accompanying sheets (hereinafter called "the immovable in this case").

2. The defendant Tokyo Masonic Association shall take proceedings for the

* *The Hanreijiho* (Judicial Reports) (441) 3-12 (May 1, 1966).

THE JAPANESE ANNUAL OF INTERNATIONAL LAW

No. 10

1966

THE JAPAN BRANCH
OF
THE INTERNATIONAL LAW ASSOCIATION

Exhibit 16

West Reporter Image (PDF)

475 U.S. 574, 106 S.Ct. 1348, 7 ITRD 2057, 89 L.Ed.2d 538, 54 USLW 4319, 1986-1 Trade Cases P 67,004, 4 Fed.R.Serv.3d 368

Briefs and Other Related Documents

Supreme Court of the United States
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al., Petitioners
v.
ZENITH RADIO CORPORATION et al.
No. 83-2004.
Argued Nov. 12, 1985.
Decided March 26, 1986.

American manufacturers of television sets brought suit against Japanese manufacturers alleging that the Japanese manufacturers had illegally conspired to drive the American manufacturers from the American market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by the Japanese manufacturers in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. The United States District Court for the Eastern District of Pennsylvania, 513 F.Supp. 1100, granted summary judgment in favor of the Japanese manufacturers. The United States Court of Appeals for the Third Circuit, 723 F.2d 238, affirmed in part and reversed in part, and the Japanese manufacturers petitioned for certiorari. The Supreme Court, Justice Powell, held that: (1) American television manufacturers could not recover antitrust damages against Japanese television manufacturers for any conspiracy by the Japanese manufacturers to charge higher than competitive prices in the American market since such conduct could not injure the American manufacturers who stood to gain from any such conspiracy, and (2) in order to survive a motion for summary judgment by Japanese manufacturers, American manufacturers were required to establish a material issue as to whether the Japanese manufacturers entered into an illegal conspiracy which caused the American manufacturers to suffer cognizable injury; because the factual context rendered the claims of the American manufacturers implausible, the American manufactures were required to offer more persuasive evidence to support their claims than would otherwise be necessary.

Reversed and remanded.

Justice White filed a dissenting opinion in which Justice Brennan, Justice Blackmun and Justice Stevens joined.

West Headnotes

[1] KeyCite Notes

29T Antitrust and Trade Regulation
29TXVI Antitrust and Foreign Trade
29Tk945 k. In General. Most Cited Cases
(Formerly 265k12(7))

American television manufacturers could not recover antitrust damages from Japanese television manufacturers based solely on an alleged cartelization of the Japanese market since American antitrust laws do not regulate the competitive conditions of other nations' economies.

[2] KeyCite Notes

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk963 Injury to Business or Property
29Tk963(3) k. Particular Cases. Most Cited Cases
(Formerly 265k28(2))

American television manufacturers could not recover antitrust damages against Japanese television manufacturers for any conspiracy by the Japanese manufacturers to charge higher than competitive prices in the American market since such conduct could not injure the American manufacturers who stood to gain from any such conspiracy; furthermore, the American manufacturers could not recover for a conspiracy to impose nonprice restraints that had the effect of either raising market prices or limiting output.

[3] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 k. Burden of Proof. Most Cited Cases

In order to survive a motion for summary judgment by Japanese manufacturers of television sets, American manufacturers were required to establish a material issue as to whether the Japanese manufacturers entered into an illegal conspiracy which caused the American manufacturers to suffer cognizable antitrust injury; because the factual context rendered implausible the claims of the American manufacturers that the Japanese manufacturers had conspired to increase prices in Japan while reducing them in the United States, the American manufacturers were required to offer more persuasive evidence to support their claims than would otherwise be necessary.

[4] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 k. Burden of Proof. Most Cited Cases

To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

*****1349 *574** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.2d 499.

Petitioners are 21 Japanese corporations or Japanese-controlled American corporations that manufacture and/or sell "consumer electronic products" (CEPs) (primarily television sets). Respondents are American corporations that manufacture and sell television sets. In 1974, respondents brought an action in Federal District Court, alleging that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging

In a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. Respondents claim that various portions of this scheme violated, *Inter alia,* § § 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. After several years of discovery, petitioners moved for summary judgment on all claims. The District Court then directed the parties to file statements listing all the documentary evidence that would be offered if the case went to trial. After the statements were filed, the court found the bulk of the evidence on which respondents relied was inadmissible, that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy, and that any inference of conspiracy was unreasonable. Summary judgment therefore was granted in petitioners' favor. The Court of Appeals reversed. After determining that much of the evidence excluded by the District Court was admissible, the Court of Appeals held that the District Court erred in granting a summary judgment and that there was both direct and circumstantial evidence of a conspiracy. Based on inferences drawn from the evidence, the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded ****1350** by excess profits obtained in the Japanese market.

Held: The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. Pp. 1354-1362.

(a) The "direct evidence" on which the Court of Appeals relied-petitioners' alleged supracompetitive pricing in Japan, the "five company ***575** rule" by which each Japanese producer was permitted to sell only to five American distributors, and the "check prices" (minimum prices fixed by agreement with the Japanese Government for CEPs exported to the United States) insofar as they established minimum prices in the United States-cannot by itself give respondents a cognizable claim against petitioners for antitrust damages. P. 1354.

(b) To survive petitioners' motion for a summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. If the factual context renders respondents' claims implausible, *i.e.,* claims that make no economic sense, respondents must offer more persuasive evidence to support their claims than would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. Pp. 1355-1357.

(c) Predatory pricing conspiracies are by nature speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment. Pp. 1357-1359.

(d) Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies. P. 1360.

(e) The Court of Appeals erred in two respects: the "direct evidence" on which it relied had little, if any, relevance to the alleged predatory pricing conspiracy, and the court failed to consider the absence of a plausible motive to engage in predatory pricing. In the absence of any rational motive to conspire, neither petitioners' pricing practices, their conduct in the Japanese market, nor their agreements respecting prices and distributions in the American market sufficed to create a "genuine issue for trial" under Federal Rule of Civil Procedure 56(e). On remand, the Court of Appeals may consider whether there is other, unambiguous evidence of the alleged conspiracy. Pp. 1360-1362.

723 F.2d 238 (CA3 1983), reversed and remanded.

***576** POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post,* p. ---.

Donald J. Zoeller argued the cause for petitioners. With him on the briefs were *John L. Altieri, Jr., Harold G. Levison, Peter J. Gartland, James S. Morris, Kevin R. Keating, Charles F. Schirmeister, Ira M. Millstein, A. Paul Victor, Jeffrey L. Kessler, Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Donald F. Turner,* and *Henry T. Reath.*

Charles F. Rule argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Wallace, Charles S. Stark, Robert B. Nicholson, Edward T. Hand, Richard P. Larm, Abraham D. Sofaer,* and *Elizabeth M. Teel.*

Edwin P. Rome argued the cause for respondents. With him on the brief were *William H. Roberts, Arnold I. Kalman, Philip J. Curtis,* and *John Borst, Jr.**

* Briefs of *amici curiae* urging reversal were filed for the Government of Japan by *Stephen M. Shapiro;* and for the American Association of Exporters and Importers et al. by *Robert Herzstein* and *Hadrian R. Katz.*

Briefs of *amici curiae* were filed for the Government of Australia et al. by *Mark R. Joelson* and *Joseph P. Griffin;* and for the Semiconductor Industry Association by *Joseph R. Creighton.*

Justice POWELL delivered the opinion of the Court.

This case requires that we again consider the standard district courts must apply ****1351** when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. ***577** *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238 (CA3 1983); 513 F.Supp. 1100 (ED Pa.1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that constitute the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs)-for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,[FN1] claiming that petitioners had illegally conspired to drive ***578** American firms from the American CEP market. According to respondents, the gist of this conspiracy was a " 'scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to

and sold in the United States.' " 723 F.2d, at 251 (quoting respondents' preliminary pretrial memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. 513 F.Supp., at 1125. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated § § 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, § 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

FN1. NUE had filed its complaint four years earlier, in the District Court for the District of New Jersey. Zenith's complaint was filed separately in 1974, in the Eastern District of Pennsylvania. The two cases were consolidated in the Eastern District of Pennsylvania in 1974.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them. The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.[FN2]

FN2. The inadmissible evidence included various government records and reports, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1125 (ED Pa.1980), business documents offered pursuant to various hearsay exceptions, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1190 (ED Pa.1980), and a large portion of the expert testimony that respondents proposed to introduce. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1313 (ED Pa.1981).

****1352** The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged ***579** conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. 513 F.Supp., at 1125-1127. After reviewing the evidence both by category and *in toto,* the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act § 2 claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the § 1 claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found no genuine issue of fact as to the conspiracy, it entered judgment in petitioners' favor on those claims as well.[FN3]

FN3. The District Court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1190 (ED Pa.1980). Respondents appealed this ruling, and the Court of Appeals reversed in a separate opinion issued the same day as the opinion concerning respondents' other claims. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 319 (CA3 1983).Petitioners ask us to review the Court of Appeals' Antidumping Act decision along with its decision on the rest of this mammoth case. The Antidumping Act claims were not, however, mentioned in the questions presented in the petition for certiorari, and they have not been independently argued by the parties. See this Court's Rule 21.1(a). We therefore decline the invitation to review the Court of Appeals' decision on those claims.

***580** B

The Court of Appeals for the Third Circuit reversed.[FN4] The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. 723 F.2d, at 260-303. These evidentiary rulings are not before us. See 471 U.S. 1002, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985) (limiting grant of certiorari).

FN4. As to 3 of the 24 defendants, the Court of Appeals affirmed the entry of summary judgment. Petitioners are the 21 defendants who remain in the case.

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," 723 F.2d, at 304, but it found that "the legal problem ... is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." *Id.*, at 304-305. Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. *Id.*, at 305. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

1. The Japanese market for CEPs was characterized by oligopolistic behavior,****1353** with a small number of producers meeting regularly and exchanging information on price and other matters. *Id.*, at 307. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry. *Ibid.*

2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to ***581** operate at something approaching full capacity in order to make a profit. *Ibid.*

3. Petitioners' plant capacity exceeded the needs of the Japanese market. *Ibid.*

4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. *Id.*, at 310. The parties refer to these prices as the "check prices," and to the agreements that require them as the "check price agreements."

5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*

6. Petitioners undercut their own check prices by a variety of rebate schemes. *Id.*, at 311. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

Based on inferences from the foregoing conclusions,[FN5] the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

FN5. In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices which produced losses, often as high as twenty-five percent on sales." 723 F.2d, at 311. The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence. See n. 19, *infra.*

***582** The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check-price agreements, liability could not be premised on those agreements. The court concluded that this case did not present any issue of sovereign compulsion, because the check-price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese Government, notwithstanding a statement to that effect by MITI itself. *Id.*, at 315.

We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (ii) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U.S. 1002, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985). We reverse on the first issue, but do not reach the second.

II

[1] [2] We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. ****1354** *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law ¶ 236d (1978).[FN6] Nor can respondents recover damages for ***583** any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940), but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five-company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F.2d, at 304-305.

FN6. The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 1413, 8 L.Ed.2d 777 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). The effect on which respondents rely is the artificially depressed level of prices for CEPs in the United States.Petitioners' alleged cartelization of the Japanese market could not have caused that effect over a period of some two decades. Once petitioners decided, as respondents allege, to reduce output and raise prices in the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. The most plausible conclusion is that petitioners chose the latter option because it would be more profitable than the former. That choice does not flow from the cartelization of the Japanese market. On the contrary, were the Japanese market perfectly competitive petitioners would still have to choose whether to sell goods overseas, and would still presumably make that choice based on their profit expectations. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

***584** Respondents nevertheless argue that these supposed conspiracies, if not themselves

grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.[FN7] The thrust of respondents' argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting *****1355*** monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

FN7. Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy-whether there is one conspiracy or several-respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 538-540, 103 S.Ct. 897, 908-909, 74 L.Ed.2d 723 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); see also Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, 93 Yale L.J. 1309 (1984). That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury.

The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,[FN8] ****585*** if proved,[FN9] would be a *per se* violation of § 1 of the Sherman Act. 723 F.2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

FN8. Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. *E.g.*, *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 238 U.S.App.D.C. 309, 331-336, 740 F.2d 980, 1002-1007 (1984), cert. denied, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985). In such cases, "predatory pricing" means pricing below some appropriate measure of cost. *E.g.*, *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-235 (CA1 1983); see *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 698, 701, 702, n. 14, 87 S.Ct. 1326, 1333, 1335, 1336, n. 14, 18 L.Ed.2d 406 (1967).There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

FN9. We do not consider whether recovery should *ever* be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. See generally Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 709-718 (1975) (discussing cost-based test for use in § 2 cases). As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one. See Part IV-A, *infra*.

III

[3] To survive petitioners' motion for summary judgment,[FN10] respondents must establish that there is a genuine issue of materialfact ***586** as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed.Rule Civ.Proc. 56(e); [FN11] *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. *Supra,* at 1354. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," ****1356** *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S., at 489, 97 S.Ct., at 697, because they actually tended to benefit respondents. *Supra,* at 1354. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

FN10. Respondents argued before the District Court that petitioners had failed to carry their initial burden under Federal Rule of Civil Procedure 56(c) of demonstrating the absence of a genuine issue of material fact. See *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Cf. *Catrett v. Johns-Manville Sales Corp.,* 244 U.S.App.D.C. 160, 756 F.2d 181, cert. granted, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985). That issue was resolved in petitioners' favor, and is not before us.

FN11. Rule 56(e) provides, in relevant part:"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Second, the issue of fact must be "genuine." Fed.Rules Civ.Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), [FN12] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca v. Atlantic Refining Co.,* 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943, 70 S.Ct. 423, 94 L.Ed. 581 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Problems***587** in Drafting and Interpreting Procedural Codes and Rules, 3 Vand.L.Rev. 493, 504-505 (1950). Cf. *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed.Rule Civ.Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592.

FN12. See n. 10, *supra.*

It follows from these settled principles that if the factual context renders respondents' claim implausible-if the claim is one that simply makes no economic sense-respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U.S., at 278-279, 88 S.Ct., at 1587. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.,* at 277, 88

S.Ct., at 1586. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*, at 280, 88 S.Ct., at 1588.

[4] Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." ***588** *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764, 104 S.Ct., at 1470. See also *Cities Service, supra*, 391 U.S., at 280, 88 S.Ct., at 1588. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764, 104 S.Ct., at 1471. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that ****1357** could not have harmed respondents. See *Cities Service, supra*, 391 U.S., at 280, 88 S.Ct., at 1588.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

IV

A

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, ***589** the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

> "Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, The Antitrust Paradox 145 (1978).

See also McGee, Predatory Pricing Revisited, 23 J.Law & Econ. 289, 295-297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U.Chi.L.Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more

rarely successful. See, *e.g.,* Bork, *supra,* at 149-155; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 699 (1975); Easterbrook, *supra;* Koller, The Myth of Predatory Pricing-An Empirical Study, ***590** 4 Antitrust Law & Econ.Rev. 105 (1971); McGee, Predatory Price Cutting: The *Standard Oil (N.J.) Case,* 1 J.Law & Econ. 137 (1958); McGee, Predatory Pricing Revisited, 23 J.Law & Econ., at 292-294. See also *Northeastern Telephone Co. v. American Telephone & Telegraph Co.,* 651 F.2d 76, 88 (CA2 1981) ("[N]owhere in the recent outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase"), cert. denied, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982).

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to ****1358** charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits***591** what they earlier gave up in below-cost prices. See *Northeastern Telephone Co. v. American Telephone & Telegraph Co., supra,* at 89; Areeda & Turner, 88 Harv.L.Rev., at 698. Two decades after their conspiracy is alleged to have commenced,[FN13] petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of petitioners. 6 App. to Brief for Appellant in No. 81-2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F.2d, at 316.[FN14] Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing-that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.[FN15]

FN13. NUE's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1953. NUE Complaint ¶ 52; Zenith Complaint ¶ 39.

FN14. During the same period, the number of American firms manufacturing television sets declined from 19 to 13. 5 App. to Brief for Appellant in No. 81-2331 (CA3), p. 1961a. This decline continued a trend that began at least by 1960, when petitioners' sales in the United States market were negligible. *Ibid.* See Zenith Complaint ¶¶ 35, 37.

FN15. Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Judge Easterbrook, commenting on this case in a law review article, offers the following sensible assessment:"The plaintiffs [in this case] maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United

States firms out of business, they could not recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation-recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition." Easterbrook, The Limits of Antitrust, 63 Texas L.Rev. 1, 26-27 (1984) (footnotes omitted).

592 ****1359** The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.[FN16] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial-as would likely be necessary593** in order to drive out the competition [FN17] -petitioners would most likely have to sustain their cartel for years simply to break even.

FN16. The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

FN17. The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and-as indicated above-the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[FN18]

FN18. The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

B

In *Monsanto,* we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *Monsanto,* 465 U.S., at 762-764, 104 S.Ct., at 1470. ***594** Respondents, petitioners' competitors, seek to hold petitioners liable for ****1360** damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.[FN19] But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto, supra,* at 763-764, 104 S.Ct., at 1470. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227, 234 (CA1 1983).

FN19. Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 505 F.Supp., at 1356-1363. Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. See 723 F.2d, at 277-282. We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV-A, *supra,* that suggest that such conduct is irrational.

In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra,* at 1357-1359, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the ***595** gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. See Easterbrook, The Limits of Antitrust, 63 Texas L.Rev. 1, 26 (1984). Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.

V

As our discussion in Part IV-A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. Cf. *Cities Service,* 391 U.S., at 279, 88 S.Ct., at 1587. The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." 723 F.2d, at 304. The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

****1361** The "direct evidence" on which the court relied was evidence of *other* combinations,

not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' ***596** claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market-the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, see *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), but its natural effect would be to raise market prices rather than reduce them.[FN20] Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

FN20. The Court of Appeals correctly reasoned that the five company rule might tend to insulate petitioners from competition with each other. 723 F.2d, at 306. But this effect is irrelevant to a conspiracy to price predatorily. Petitioners have no incentive to underprice each other if they already are pricing *below* the level at which they could sell their goods. The far more plausible inference from a customer allocation agreement such as the five company rule is that petitioners were conspiring to *raise* prices, by limiting their ability to take sales away from each other. Respondents-petitioners' competitors-suffer no harm from a conspiracy to raise prices. *Supra,* at 1354. Moreover, it seems very unlikely that the five company rule had any significant effect of any kind, since the "rule" permitted petitioners to sell to their American subsidiaries, and did not limit the number of distributors to which the subsidiaries could resell. 513 F.Supp., at 1190.

That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations,***597** the conduct does not give rise to an inference of conspiracy. See *Cities Service, supra,* 391 U.S., at 278-280, 88 S.Ct., at 1587-1588. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below-market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." Fed.Rule Civ.Proc. 56(e).[FN21]

FN21. We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.*, at 763-764, 104 S.Ct., at 1470. See *supra,* at 1356.

****1362** On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "ten[d] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically***598** senseless conspiracy. *Monsanto,* 465 U.S., at 764, 104 S.Ct., at 1471. In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in Part II, *supra,* respondents could not have suffered a cognizable injury from any action that *raised* prices in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check-price agreements. The sovereign compulsion question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, with whom Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), and *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962). After surveying the massive record, including very ***599** significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of § § 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that ****1363** "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Ante,* at 1356 (quoting *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592). I also agree that " '[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.' " *Ante,* at 1356 (quoting *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

> "[T]he Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude ***600** that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante,* at 1353.

In a similar vein, the Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra,* as holding that "courts should not permit factfinders to infer conspiracies when such inferences are

implausible...." *Ante,* at 1360. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.[FN1] These holdings in no way undermine***601** the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

FN1. The Court adequately summarizes the quite fact-specific holding in *Cities Service. Ante,* at 1356.In *Monsanto,* the Court held that a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is not, *standing alone,* sufficient to create a jury question. 465 U.S., at 763-764, 104 S.Ct., at 1470. To understand this holding, it is important to realize that under *United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), it is permissible for a manufacturer to announce retail prices in advance and terminate those who fail to comply, but that under *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will sell the goods. Thus, a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is lawful under *Colgate, unless* the termination is pursuant to a shared understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. *Monsanto* holds that to establish liability under *Dr. Miles,* more is needed than evidence of behavior that is consistent with a distributor's exercise of its prerogatives under *Colgate.* Thus, "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U.S., at 764, 104 S.Ct., at 1471. *Monsanto* does *not* hold that if a terminated dealer produces some further evidence of conspiracy beyond the bare fact of postcomplaint termination, the judge hearing a motion for summary judgment should balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions***1364** that invade the factfinder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ante,* at 1355, n. 8. This statement is premised on the assumption that "[a]n agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or ... some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasingexports ***602** to this country resulted in depressed prices here, which harmed respondents.[FN2] Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that

petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.FN3

FN2. Dr. DePodwin summarizes his view of the harm caused by Japanese cartelization as follows:"When we consider the injuries inflicted on United States producers, we must again look at the Japanese television manufacturers' export agreement as part of a generally collusive scheme embracing the Japanese domestic market as well. This scheme increased the supply of television receivers to the United States market while restricting supply in the Japanese market. If Japanese manufacturers had competed in both domestic and export markets, they would have sold more in the domestic market and less in the United States. A greater proportion of Japanese production capacity would have been devoted to domestic sales. Domestic prices would have been lower and export prices would have been higher. The size of the price differential between domestic and export markets would have diminished practically to the vanishing point. Consequently, competition among Japanese producers in both markets would have resulted in reducing exports to the United States and United States prices would have risen. In addition, investment by the United States industry would have increased. As it was, however, the influx of sets at depressed prices cut the rates of return on television receiver production facilities in the United States to so low a level as to make such investment uneconomic."We can therefore conclude that the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements. Thus, the collusive behavior of Japanese television manufacturers resulted in a very severe injury to those American television manufacturers, particularly to National Union Electric Corporation, which produced a preponderance of television sets with screen sizes of nineteen inches and lower, especially those in the lower range of prices." 5 App. to Brief for Appellants in No. 81-2331 (CA3), pp. 1629a-1630a.

FN3. The DePodwin Report has this, among other things, to say in summarizing the harm to respondents caused by the five company rule, exchange of production data, price coordination, and other allegedly anti-competitive practices of petitioners:"The impact of Japanese anti-competitive practices on United States manufacturers is evident when one considers the nature of competition. When a market is fully competitive, firms pit their resources against one another in an attempt to secure the business of individual customers. However, when firms collude, they violate a basic tenet of competitive behavior, i.e., that they act independently. United States firms were confronted with Japanese competitors who collusively were seeking to destroy their established customer relationships. Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel members would not become involved. But just as importantly, each Japanese firm would be assured that what was already a low price level for Japanese television receivers in the United States market would not be further depressed by the actions of its Japanese associates."The result was a phenomenal growth in exports, particularly to the United States. Concurrently, Japanese manufacturers, and the defendants in particular, made large investments in new plant and equipment and expanded production capacity. It is obvious, therefore, that the effect of the Japanese cartel's concerted actions was to generate a larger volume of investment in the Japanese television industry than would otherwise have been the case. This added capacity both enabled and encouraged the Japanese to penetrate the United States market more deeply than they would have had they competed lawfully." *Id.,* at 1628a-1629a.For a more complete statement of DePodwin's explanation of how the alleged cartel operated, and the harms it caused respondents, see *Id.,* at 1609a-1642a. This material is summarized in a chart found *Id.,* at 1633a.

***603 ****1365** The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents. FN4

FN4. In holding that Parts IV and V of the Report had been improperly excluded, the

Court of Appeals said:"The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese television cartel. 505 F.Supp. at 1342-46. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue." *In re Japanese Electronics Products Antitrust Litigation,* 723 F.2d 238, 280 (CA3 1983).The Court of Appeals had similar views about Parts VI and VII.

***604** The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. See, *e.g., ante,* at 1360. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III-B, *infra,* I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [T]he 'direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Ante,* at 1361. The Court's position is without substance.

A

The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five company rule and check prices as " 'direct evidence' of a conspiracy that injured respondents." *Ante,* at 1354 (citing *In re Japanese Electronics Products Antitrust Litigation,* 723 F.2d 238, 304-305 (CA3 1983)). The passage from the Third ***605** Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Ibid.* The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five company rule could support a finding of antitrust injury to respondents.[FN5] The Third ****1366** Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id.,* at 306, 310-311. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five company rule was not a simple price-raising device:

FN5. I use the Third Circuit's analysis of the five company rule by way of example; the court did an equally careful analysis of the parts the cartel activity in Japan and the check prices could have played in an actionable conspiracy. See generally *Id.,* at 303-311.In discussing the five-company rule, I do not mean to imply any conclusion on the validity of petitioners' sovereign compulsion defense. Since the Court does not reach this issue, I see no need of my addressing it.

"[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id.,* at 311.
I see nothing erroneous in this reasoning.

B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But ***606** the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. *Ibid.* The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors ... that suggest that such conduct is irrational." *Ante,* at 1360, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." 723 F.2d, at 282. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need-nor do I-to address the District Court's analysis point by point. The District Court's criticisms of DePodwin's***607** methods are arguments that a factfinder should consider.

IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm ****1367** the judgment below and remand this case for trial.

U.S.Pa.,1986.
Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.
475 U.S. 574, 106 S.Ct. 1348, 7 ITRD 2057, 89 L.Ed.2d 538, 54 USLW 4319, 1986-1 Trade Cases P 67,004, 4 Fed.R.Serv.3d 368

Briefs and Other Related Documents (Back to top)

- 1985 WL 669662 (Appellate Brief) Reply Brief for Petitioners (Oct. 24, 1985)
- 1985 WL 669661 (Appellate Brief) Brief for Respondents (Oct. Term 1985)
- 1985 WL 669668 (Appellate Brief) Brief of the Semiconductor Industry Association as Amicus Curiae in Support of Respondents (Sep. 06, 1985)
- 1985 WL 669667 (Appellate Brief) Brief for the United States as Amicus Curiae Supporting Petitioners (Jun. 17, 1985)
- 1985 WL 669666 (Appellate Brief) Motion of American Association of Exporters and Importers and Consumers for World Trade for Leave to File Brief as Amici Curiae and Brief as Amici Curiae in Support of the Petitioners (Jun. 16, 1985)
- 1985 WL 669660 (Appellate Brief) Brief for Petitioners (Jun. 14, 1985)
- 1985 WL 669665 (Appellate Brief) Motion for Leave to File Brief Amici Curiae and Brief of the Governments of Australia, Canada, France, and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners (Jun. 14, 1985)
- 1985 WL 669664 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief for the Government of Japan as Amicus Curiae in Support of Petitioners (Jun. 04, 1985)
- 1985 WL 669659 (Appellate Brief) Supplemental Brief for Petitioners Pursuant to Rule 22.6 (Jan. 23, 1985)

• 1985 WL 669658 (Appellate Brief) Supplemental Brief of Respondents In Response to the Brief of the United States as Amicus Curiae (Jan. 14, 1985)
• 1985 WL 669663 (Appellate Brief) Brief for The United States as Amicus Curiae (Jan. 04, 1985)
• 1984 WL 565879 (Appellate Brief) Supplemental Brief of Petitioners (Jul. 23, 1984)
• 1984 WL 565878 (Appellate Brief) Reply Brief for Petitioners (Jul. 18, 1984)
• 1984 WL 565877 (Appellate Brief) Supplemental Brief of Respondents (Jul. 17, 1984)
• 1984 WL 565881 (Appellate Brief) Motion of American Association of Exporters and Importers and Consumers for World Trade for Leave to File Brief as Amici Curiae and Brief as Amici Curiae in Support of the Petition for a Writ of Certiorari (Jul. 07, 1984)
• 1984 WL 565880 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief of the Government of Japan as Amicus Curiae in Support of the Petition for A Writ of Certiorari (Jul. 06, 1984)
END OF DOCUMENT

West Reporter Image (PDF)

Exhibit 17

Not Reported in F.Supp., 1982 WL 1906 (W.D.Wash.), 1982-83 Trade Cases P 65,010
United States District Court; W.D. Washington.

United States

v.

C. Itoh & Co., Ltd., Kyokuyo Co., Ltd., Mitsui & Co., Ltd., Nippon Reizo Kaisha, Ltd., Nippon Suisan Kaisha, Ltd., Shinko Sangyo Trading Co., Ltd., Taiyo Fishery Co., Ltd., and Toshoku Ltd.

No. C-82-810

Entered October 20, 1982

VOORHEES, D. J.

Final Judgment

***1** Plaintiff United States of America, having filed its complaint in this case, and plaintiff and defendants, by their respective attorneys having consented to waive, solely for the purpose of this Final Judgment, their rights to contest the jurisdiction of the Court over their persons, and having further consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby,

Ordered, Adjudged, and Decreed as follows:

I.

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against each defendant under Section 1 of the Sherman Act (15 U. S. C. § 1).

II.

[*Definitions*]

As used in this Final Judgment, the term:

(A) "Person" shall mean any individual, corporation, partnership, firm, association, or other business or legal entity;

(B) "Processed seafood" shall mean any fish or shellfish prepared in or off the shore of Alaska by any commercial process, including canning, packing, freezing, or the addition of chemical substances;

(C) "JMPIA" shall mean the Japan Marine Products Importers Association and includes any formal or informal committee or subcommittee thereof;

(D) "Importer" shall mean any person, including each of the defendants, that purchases processed seafood from U. S. persons for resale in Japan;

(E) "Japanese translation" shall mean an accurate Japanese language translation of this Final Judgment.

III.

[*Applicability*]

This Final Judgment applies to the defendants, their successors and assigns and to their respective subsidiaries, officers, directors, agents and employees and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Purchase Price Fix; Information Exchange*]

Each defendant is enjoined from:

(A) Entering into, adhering to, maintaining, furthering, participating in, or enforcing any agreement, arrangement, understanding, combination, or conspiracy with any other importer or group of importers to fix, maintain, establish, or adhere to the prices, range of prices, or other terms or conditions for the purchase of processed seafood from any U. S. person or persons;

(B) Communicating with any other importer or group of importers to exchange information or opinions concerning (i) current season or future prices for the purchase of processed seafood from any U. S. person or persons; (ii) current season or future price offers or counteroffers made or received, to be made, or under consideration for the purchase of processed seafood from any U. S. person or persons; (iii) strategy, timing, or conduct of negotiations for the current season or future purchases of processed seafood from any U. S. person or persons; or (iv) quantity of processed seafood being or to be purchased from any U. S. person or persons; and

***2** (C) Attending or participating in any meeting with any other importer or group of importers

during which such defendant knows or has been advised that any importer will discuss any subject listed in paragraph IV(B) hereof.

V.

[*Permitted Activities*]

Except to the extent undertaken for the purpose of circumventing the prohibitions of Section IV hereof, nothing contained in this Final Judgment shall prohibit:

(A) Any necessary communication or negotiation between a defendant and any other person in connection with a contemplated or actual purchase or sale of processed seafood between such persons;

(B) Transactions or communications between a defendant and its parent or subsidiary or between the officers, directors, agents or employees thereof when acting in such capacity;

(C) Joint ventures for purposes of processing, storing, shipping, or harvesting fish or shellfish, and such transactions or communications as are necessary to the operation, management or business thereof;

(D) A defendant from engaging in any conduct, action, activity or communication with any other person, if such conduct, action, activity or communication is required by statute, law, rule or regulation having the force of law in the jurisdiction in which such conduct, action, activity or communication takes place;

(E) Any negotiation or communications between a defendant and any other person on questions of the definition of grading and quality standards; on-site inspection, grading and contract administration; shipping; packaging; and similar technical matters;

(F) Provision by a defendant of information on prices at which it has purchased processed seafood or on quantities of processed seafood purchased by, or delivered to, it to a privately operated system of data exchange under which the data is aggregated in such a way that neither the identity of the parties nor information relating to individual transactions is disclosed to or reasonably ascertainable by any other importer, and the receiving of such aggregated information;

(G) Communciation of information concerning existing contracts to the extent such information has already been publicly disseminated through regularly published newspapers, trade journals or trade periodicals;

(H) Participation in a meeting called and chaired or vice-chaired by an official of the Japanese Fisheries Agency at which participants discuss their estimates of the total amount of any processed seafood product or products that will be imported into the Japanese market during a particular period, provided that such meetings do not include discussions by individual firms of their own import plans; or

(I) Provision by a defendant of any information concerning the purchase of processed seafood to the Government of Japan or any agency or department thereof, provided that in the course of transmitting such information it is not divulged to any other importer.

VI.

[*Report on Meetings*]

For a period of five years from the date of entry of this Final Judgment, each defendant is ordered to file annually with the plaintiff an affidavit, prepared without direct or indirect communication with any other defendant, identifying each JMPIA meeting that defendant attended at which processed seafood was discussed and each meeting with any other importer or group of importers during which any subject listed in paragraph IV(B) was discussed. Such affidavit shall contain a detailed account of all discussion at such meetings relating to the purchase and importation of processed seafood, the date of such meetings, and to the extent known, the names and company affiliation of each person in attendance. If the defendant attended no such meetings, the affidavit shall so state. Such affidavit, if in Japanese, shall be accompanied by an English translation. Nothing in this Section VI shall require reports of discussions permitted by Section V hereof.

VII.

[*Compliance*]

***3** Unless otherwise provided, each defendant is ordered and directed to:

(A) Within thirty (30) days after the date of entry of this Final Judgment and annually thereafter for ten (10) years, furnish a copy of this Final Judgment (accompanied by a Japanese translation, where required) to its president or chief executive officer, and to each of its officers, directors, agents and employees (whether located in Japan or the United States) then responsible, in whole or in part, for making pricing decisions for, or purchases of, processed seafood;

(B) Furnish a copy of this Final Judgment (accompanied by a Japanese translation, where required) to each successor to those persons described in paragraph VII(A) hereof, within thirty (30) days after such successor assumes responsibility for pricing decisions for, or purchases of, processed seafood;

(C) Attach to each copy of this Final Judgment furnished pursuant to paragraphs VII(A) and (B) hereof a statement in Japanese advising each person of the nature, scope, and prohibitions of the U. S. antitrust laws and that it is the policy and the intent of the defendant to comply with the requirements of the antitrust laws and the Final Judgment. Such statement shall also include an instruction that each agent and employee is required to comply with the Final Judgment, describe the consequences, including possible civil or criminal penalties, to the defendant, and its agents and employees, of a failure to comply, and advise that the defendant's legal advisors are available at all reasonable times to confer regarding any compliance question or problem;
(D) Within thirty (30) days after the date of entry of this Final Judgment, furnish each member company of the JMPIA with a copy of this Final Judgment, together with a Japanese translation, by mailing a copy to the president or other appropriate officer of such member company or ascertaining that either the JMPIA or another defendant has done so; and
(E) File with this Court and serve upon the plaintiff, within sixty (60) days from the date of entry of this Final Judgment, a statement as to the facts and manner of its compliance with paragraphs VII(A), (C) and (D) hereof, and the measures that it has taken to assure compliance with paragraph VII(B) hereof.

VIII.

[*Inspections*]

(A) For the purpose of determining or securing compliance with this Final Judgment:
(1) Upon receipt of a written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, each defendant shall, on reasonable notice and subject to any legally recognized privilege:
(a) Provide within sixty (60) days to the Department of Justice in Washington, D. C., copies of any books, ledgers, accounts, correspondence, memoranda, and other documents or records in the possession or under the control of such defendant relating to any subjects covered by this Final Judgment;
(b) Submit written reports, under oath if requested, in English or accompanied by an English translation, with respect to its compliance with this Final Judgment as may, from time to time, be requested; and
*4 (c) Permit any duly authorized representative of the Department of Justice, subject to the reasonable convenience of each defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any subject covered by this Final Judgment. This paragraph shall not require international travel by the person to be interviewed. Such request and notice may be made by delivery to the person appointed pursuant to Section X of this Final Judgment to receive service of process on behalf of each defendant. Nothing in this paragraph VIII(A)(1) shall require any defendant to take any action in Japan which is prohibited by the Government of Japan pursuant to provisions of Japanese law, provided that the defendant has exercised good faith efforts to obtain permission of the appropriate person or governmental authority but such permisison has not been secured.
(2) Each defendant shall provide written notice in English to plaintiff prior to engaging in any transaction or activity that, but for the provisions of paragraph V(D) and V(F) hereof, would be prohibited by this Final Judgment. Such notice shall describe the transaction or activity and identify, if applicable, the statute, law, rule or regulation that the defendant believes requires such transaction or activity to be undertaken. In the event that such defendant is unable, despite the exercise of good faith efforts, to provide such notice prior to engaging in the required transaction or activity, the defendant shall do so as soon as practicable but not later than thirty (30) days thereafter.
(B) No information or documents obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law. The defendant from which such documents or information was obtained shall be given twenty (20) days written notice prior to the disclosure of such documents or information in any legal proceeding (other than a grand jury proceeding) to which such defendant is not a party or pursuant to a request under the Freedom of Information Act.

IX.

[*Retention of Jurisdiction*]

Jurisdiction is retained by this Court for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such orders or directions as may be necessary or appropriate for the construction or implementation of this Final Judgment, for the modification of

any of its provisions, for the enforcement of compliance with its terms, and for the punishment of violations of its terms.

X.

[*Appointment of Agent*]

Each defendant shall appoint a person located in the United States as its agent for service of process in any proceeding for the purpose of the construction, implementation, modification, enforcement of compliance, or punishment of any violation of this Final Judgment. Each defendant shall maintain such agent for the life of this Final Judgment and, within ten (10) days from the date of entry of this Final Judgment, file with this Court and serve on plaintiff a statement identifying such agent. In the event of a need to appoint a successor agent, defendant shall immediately file with this Court and serve on plaintiff a statement identifying the successor agent.

XI.

[*10-Year Term*]

***5** This Final Judgment shall expire ten (10) years from its date of entry.

XII.

[*Public Interest*]

Entry of this Final Judgment is in the public interest.

U.S. v. C. Itoh & Co., Ltd.

Not Reported in F.Supp., 1982 WL 1906 (W.D.Wash.), 1982-83 Trade Cases P 65,010

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Contents

Chapter 3

Natural Resources

Introduction

Natural resource trade is most likely to conform to trade as explained by a sta trade theory framework. As characterized by Yoffie (1993), industrial pol interventions (e.g. R&D subsidy, national regulatory frameworks) are significan less common than in R&D intensive sectors or internationally traded services.[1] the same time, the role of MNE strategy may also be substantially less importa This has two implications. First, trade is determined by country-cost advantages a that second, *ceteris paribus*, global market concentration will be lower than in otl sectors. The source of competitive advantage for firms in these sectors is determir by access to scarce natural resources. As scarcity increases, the opportunity cost production rises.[2] In turn, firms that can minimize costs in this traditio microeconomic sense will win international competition. Examples of this kind industry are basic textiles, agricultural and commodity products such as coffee. natural resource industries where firm economies of scale are important, produc are sensitive to the need to maintain output as a means of achieving (or getting clc to achieving) minimum efficient scale (MES). If all the firms compete vigorou for market share, then the least cost-efficient firms will lose out (a vicious spiral that faced with falling prices, firms with shrinking market share become less a less cost-efficient). An alternative, and certainly more acceptable one to high c producers, is to collude on market share. Sectors such as iron, steel and ba chemicals fall under the category.

Of course, in order for the collusion to be successful, it is necessary to raise en barriers. Thus, trade policy (if the main potential source of lower-cost competition import competition) can serve as the necessary barrier-to-entry. Where MNEs a present, they are likely to produce where they can access the natural resources lowest cost. Thus, multinational ownership is a function of access to scar resources rather than other motives as may be observed in other 'globa oligopolistic' sectors. High transport costs are often a feature of natural resour industries especially if the source of the commodities are distant from the fir market for the goods or the natural resource is dangerous to handle or bulky. Indec anything that can raise the costs of transport and storage for exporting firms is like to substantially raise overall costs for producers.[3]

Research Questions

The chapter aims to answer the following questions:

(a) What are the characteristics of natural resource industries?
(b) How does the nature of natural resource industries determine trade and investment flows?
(c) What are the implications of this for trade policy and antitrust in isolation?
(d) What are the implications for the relationship between trade and antitrust?

Methodology and Structure

This chapter is based around two case studies. The first explores a case of how import cartelization acts as a barrier to entry for imports in a seafood sector: Tanner Crab. The persistence of import cartelization in this case is related to the lax enforcement of antitrust. Thus, inappropriate antitrust enforcement acts to frustrate international trade.

The second and main case is a detailed analysis of the EU soda ash sector. Both GATT (1993) and OECD (1998a) refer to this case as an example of the contradictions between trade and antitrust. The case illustrates the relationship between anti-dumping policy and domestic collusion. It demonstrates that where international trade is determined by access to scarce natural resources, a restrictive trade policy will lead to losses in allocative efficiency. Moreover, where there are economies of scale in production, domestic market structure will provide incentives to cartelize, especially if there is a source of lower cost competition.

The case shows that domestic manufacturers of soda ash used anti-dumping measures to facilitate domestic collusion thus demonstrating the pro-cartel impact of anti-dumping measures. This conclusion is similar to that of Messerlin (1990) whose work is explored in detail below. However, the key contribution of this case study is to go beyond Messerlin's approach which was to use official regulations and trade flows to 'calculate' the costs of protection to EU consumers and the fines imposed on EU firms for cartelization.

This case study uses a broader range of primary sources to build a detailed picture of the industry. It uses interviews with industry and government, working documents by the EU, submissions to DG I during the anti-dumping investigation, rulings of the ECJ on the EU cartel in addition to the official EU regulations and decisions. It is this detailed 'unpicking' of the case which aims to draw out the conclusions on the relationship between trade and antitrust in this sector. In a number of cases, both the documentation and especially in the interviews, it has been necessary to respect confidentiality. In cases such as anti-dumping and competition cases, both governments and firms are sensitive to the publication of commercially sensitive information and frequently request confidentiality. Moreover, EU institutions need to maintain confidentiality as a fundamental premise for their procedures. This chapter is organized as follows. The first section features the case of seafood. This sector demonstrates the classic problems of high-cost producers when faced with competition that has access to scarce resources. It details an attempt by Japanese high-cost producers to prevent the entry of Alaskan low-cost

producers through an import cartel. The apparent failure of Japanese authoritie prosecute the cartel led to a US court prosecuting extraterritorially the activitie the Japanese firms. This case study illustrates that poorly enforced antit facilitates collusion that acts as a barrier-to-entry to import sources. It suggests mutual liberalization of trade and antitrust is the optimal policy in this case.

The rest of the chapter forms the second and central case study for this chap This second case study explores the soda ash sector. It analyses the linka between the imposition of anti-dumping measures against the most cost-competit producers in the US and the incidence of an intra-EU cartel. There is an additic factor in this case in that although country-cost advantages were the predomin explanation for the competitive advantage of firms in the soda ash sector, the nat of production is such that economies of scale internal to the firm play a role in reduction. It also means that firms may have incentives to collude when faced declining market share. As will be explained in below, successful collusion requi among other things, the need for high entry barriers. As will be analysed bel there is a case that in soda ash, anti-dumping served to provide those barrier entry. There is a concluding section that provides conclusions to the case studies their implications for trade and antitrust.

Seafood: Alaskan Tanner Crab

In the *Tanner Crab* case, the US Department of Justice (DOJ) prosecuted a Japan import cartel of crab meat which was allegedly trying to use its market powe depress the price that US seafood processing firms could sell to the Japanese fir *Tanner Crab* arose out of a complaint filed with the DOJ by a US fishermen's un against a group of Japanese trading firms including two major trading firms (*Sc Shosha*), C. Itoh & Co. and Mitsui & Co. who were accused of illegally exchang price information. US fishing fleets had complained to the JFTC but the imp cartel persisted. They therefore turned to the US authorities to seek extraterrito redress. Processed crabs caught by US fishing fleets were exported to trad companies in Japan. The complaint detailed an association called the Japan Marine Products Importers Association (JMPIA) created by the trading firms order to exchange price information. The JMPIA was based in Tokyo and wa broad association of seafood importers that included a crab committee. The JMI met periodically and acted as a forum for discussions concerning the importatior Japan of processed Alaska crab. Each trading firm disclosed the price offered details of proposed purchases offered to it by the US exporters. The prim objective was to ensure that such an exchange of price information would ena each trading firm to agree prices at which they would be prepared to purchase tan crabs. If one firm learned that it had been offered a higher price than another trad firm had, it would negotiate the price down based on information gathered throu the JMPIA.

This import cartel had the effect of lowering the import price from what it wo have been in the absence of information exchange. The DOJ launched investigation into the case to determine whether there had been a violation of antitrust law and filed a civil suit against the Japanese trading firms. The Japan

firms proposed a consent judgment that was accepted and the JMPIA agreed to cease activities.

The graph below explains the economics of the import cartel described above. *D(dom)* is the demand curve of Japanese consumers who rely on imports of crabs. It is assumed that Japanese consumers prefer tanner crabs to domestically produced varieties. In the absence of the import cartel, Japanese consumers purchase quantity *OQc* of crabs at a price *OPc*. This is point *D* on the graph. If the JMPIA organizes the price cartel, by lowering the price that the trading firms are willing to pay *OPm*, they will lower the quantity supplied to *OQm*. In other words, the trading firms restrict their purchases up to the point where the marginal supply cost equals the marginal value of the imports at point *A*. The buying cartel gains the monopsony rent *P(dm)ABPc* at the expense of the suppliers and consumers (i.e. the amount saved due to the lowering of price) but it sacrifices the surplus *ABD* that is lost through the output restriction. ACD is the dead-weight loss.

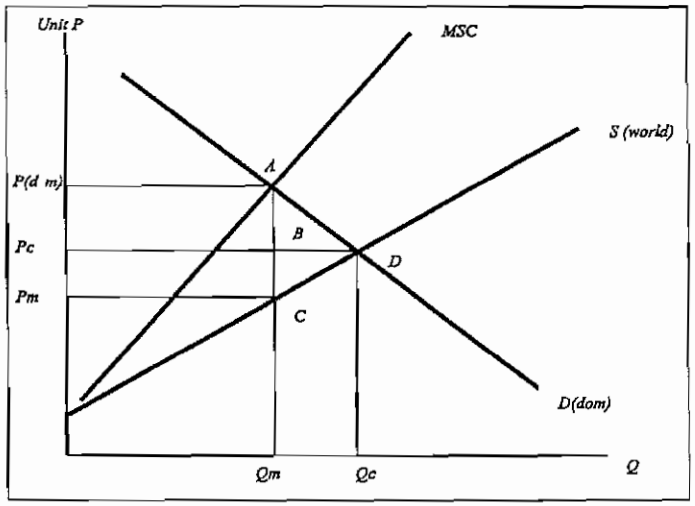

Figure 3.1 The Tanner Crab Import Cartel

Source: Author's own diagram

Matsushita (1991) is doubtful that the import restriction would have had the effect of raising the domestic price of the commodity imported into Japan. It would have been necessary to arrange a price-fixing cartel within Japan for this to succeed. This is because there would always be the possibility that the JMPIA may be unstable and break up. As with any cartel, Matsushita is arguing that there are potential gains from cheating and undercutting the cartel. The maintenance of the

cartel is crucially dependent on the ability of the JMPIA to punish potential che and block new entry. It would be economically disadvantageous for the JMI cartel to sell the restricted imports of tanner crabs at the price at which tl purchased them given that the cartel had successfully isolated the Japanese marl There would be considerable profit to be made in selling the imports at a hig price in Japan. Moreover, it may have made more sense in a broader context of domestic Japanese seafood industry for the JMPIA to restrict imports of crabmeat that would be competing with the domestic industry. In this way at le the domestic industry would be protected from foreign competition. The condit that would allow the import cartel to capture the profits would be an ability prevent Alaskan fishing fleets from importing directly into Japan to final custom This is precisely what the JMPIA prevented by acting as an exclusive importer i Japan. The key assumption made here is that by lowering the price of impor crabs, the JMPIA would make it impossible for US exporters to sell in Ja independent of the JMPIA. This would have the effect of reducing the market sh taken by non-Japanese sources. In Matsushita's view, the possibility that this mi have occurred is remote. However, if the aim of an import cartel were to rest foreign supply, an effective way of doing so would be to pursue a policy of pr information exchange. It is considerably more difficult to monitor and prove t imports were being restricted through lower prices. If US exporters are not will to supply at the price offered, it could be construed as a 'voluntary' exercise on part of the exporters not to supply the Japanese market. As the trading fir concerned agreed sole import agency agreements with the US crab meat processo then it is easier to monitor and prevent the parallel importation of the goods. Th the nature of import transactions in Japan through the use of trading firms co have created situations in which market access is difficult.

One problem with this case is that because it never went to a full hearing, the facts of the case never became known. However, the judgment did outline prohibitions on the JMPIA activities. These included the prohibition of each trad firm from 'entering into, maintaining, furthering, participating in, or enforcing agreement, arrangement, understanding, combination, or conspiracy with any ot importer or group importers to fix, maintain, establish, or adhere to the prices, ra of prices, or other terms and conditions for the purchase of processed seafood.' addition, the JMPIA members were prohibited from communicating with any ot importer or group of importers to exchange information on future pricing offers US 'processed seafood'; 'strategy, timing, or conduct of negotiations for the curr season or future purchases of processed seafood'.[4] Given the consent judgm offered by members of the JMPIA, it is likely that US authorities had proba discovered an attempt by Japanese firms to maximize profits at the expense of producers and arguably, Japanese consumers. Surely, the US authorities w correct in seeking prosecution of the Japanese firms in the interests of US firms Japanese consumers? This is especially the case given the fact that the JFTC did bring an end to the import cartel.

Conclusion

The findings of this case study are as follows. First, where the main source of cost-efficient competition is from imports, poorly enforced antitrust acts as a barrier to entry for import competition by facilitating domestic collusion. In other words, it allows firms to erect private trade barriers. Thus even if there are no government agreed trade barriers, the absence of antitrust policy (or the lack of its enforcement) serves the purpose of a restrictive trade agreement. Second, asymmetric enforcement of antitrust can also serve to promote extraterritorial application of domestic competition law (as with the US antitrust action in *Tanner Crab*) which undermines the multilateral trade process and increases international conflict even if the source of the inefficiency is rooted out by such action (see chapter 5).

The Chemical Industry: Soda Ash[5]

Introduction

This section explores the interface of trade and antitrust in the chemical sector. In particular, it includes a detailed analysis of the soda ash sector and this is the main research contribution to this chapter. As background, there is a brief historical section of the evolution of international cartels. This is complemented by a detailed discussion of the work of Patrick Messerlin who analysed cartelization and anti-dumping measures in low density polyethylene (LdPE) and polyvinyl chloride (PVC) in the EU. The starting point is the realization that most, if not all, chemical sub-sectors are imperfectly competitive. On a theoretical level, the industrial organization literature has contributed greatly to the understanding of competitive structures and conduct of firms in markets or sectors that are termed imperfectly competitive or oligopolistic. The analysis has tended to be focused on national or domestic industries rather than international cartels. Nevertheless, a number of the basic theoretical axioms are relevant. As discussed in chapter 1, imperfect competition implies the presence of supernormal profits for a small number of large firms producing in the market. From an antitrust policy perspective, the extent to which firms are able to exploit their market power is relevant when issues of anti-competitive practices are raised. Market contestability, a measure of the ease of exit and entry facing firms and its related costs, has become an intellectual and empirical yardstick by which markets and sectors have been examined by industrial organization. The implications for antitrust policy are that it rests on the premise that action should be taken only when incumbent firms are attempting to abuse their market power rather than the prohibition of large market share by itself. One of the primary aims of antitrust therefore has been the promotion of market contestability.

Another important characteristic of the chemical industry more generally is that with the exception of pharmaceuticals, many products in the industry are largely of an intermediate nature (being used downstream in other industries e.g. plastics for use in cars or consumer electronics). In this sense, sub-sectors of the chemical industry are vulnerable to significant cycles of demand in line with demand for downstream products. Given the nature of fixed costs and hence the need to

maintain capacity and economies of scale in the industry, firms may be forced engage in cut-throat competition in order to maintain production in the face shrinking demand.[6] Moreover, if cost pressures rise in final goods mark producers of these goods may seek to economize on intermediate inputs or s lower cost alternatives.

These factors enhance the vulnerability of chemical firms and faced with s outcomes, the incentives for attempts at price co-ordination or other forms collusion are potentially high. This is enhanced by the presence of a relatively sn number of large firms. The costs of enforcing a cartel orchestrated by a relativ small number of firms who supply a large amount of the total market wit homogenous product may be less problematic than in situations in which there a larger number of firms producing differentiated products. Under th circumstances, market contestability cannot be assured without some attempt antitrust authorities to monitor and counter potential anti-competitive practices. T question facing antitrust therefore is whether it is possible for firms to orga successfully such anti-competitive activity.

The potential impediments to successful collusion are high across m manufacturing sectors. The dilemma facing any potential cartel is how they successfully enforce the rules and punish any firms who decide to break the ca without being discovered by antitrust authorities. Thus, the chemical industry sho be not be regarded any differently to any other industrial sector in the economy. Y when a close look is taken at the history of the industry, cartelization is rife. I only have collusive activities been successfully carried out within countries, incidence of collusion at an *international* level is astonishingly high. For ma years, the large chemical conglomerates of Germany, the UK and the US maintai agreements whereby competition between firms was minimized and geographi market divisions were set up whereby the firms involved would agree not compete with each other. Stocking and Watkins (1946, 1948) detail late 19th early 20th century attempts at the formation of global cartels.

Trade Policy and Collusion

In recent years, Patrick Messerlin (1990) has studied the chemical sector with a vi to assessing the impact of trade protection such as anti-dumping on the ability firms to cartelize markets. Messerlin's work on the European polyethylene PVC LdPE market has shown that West European chemical firms exploited anti-dump policy against low-cost East European firms for the purposes of price maintena in the West European market by preventing the entry of lower cost competitors fr East Europe. Moreover, Messerlin estimates that the benefits to producers of hig priees in West European markets as a consequence of the anti-dumping duties the collusion far outweighed the eventual fines imposed on these producers cartelization. The polyethylene and PVC cases are far from unique since World W II. Another example of an international cartel was in the chemical fibre sector in 1970s. Japanese firms regarded as being competitive with their US and Europe counterparts in this sector and they thus represented a genuine threat to US European producers. As a result of a trade agreement between the US and Japan governments whereby the Japanese firms agreed to restrict their exports to the

Japan, the cost of fishing for crab in Japan was substantially higher than in Alaska. If the Alaskan crab companies could have sold direct to Japanese consumers, they would have significantly undercut the price of Japanese competitors and hence the need for protection.

However, in the more interdependent economy as depicted in chapter 1, the links between traditional policy boundaries have become blurred and thus as Ostry (1997) and Jacquemin and Sapir (1991) suggest, a restrictive trade policy effectively acts as a barrier to entry into an oligopolistic domestic market. In the starkest terms, anti-dumping facilitates domestic collusion.

By the same token, poorly enforced antitrust allows firms to erect their own trade barriers e.g. the JSAIA import cartel. A similar argument holds for the Tanner Crab case – the JMPIA were able to orchestrate their import cartel by virtue of inadequate investigation by the JFTC. It required US legislators to impose US law (rightly or wrongly) in order for the cartel to be broken up and to allow the Alaskan producers to exploit their competitive advantage. Thus, it was necessary for the JMPIA to orchestrate the cartel to erect a trade barrier: private actors imposing their own protectionism. Moreover, in scarce-resource industries, there are few arguments to support the pursuit of strategic trade policy or derogations from antitrust on the basis of the existence of external economies or learning economies of scale as in the case of innovation intensive industries. Competitive advantage can only reside among those firms who have access to those scarce resources.

Notes

1 Although the decision of the US government in 2002 to impose trade tariffs of 30 percent on steel imports is an exception to this rule.
2 Scarcity increases as non-renewable resources are used up. In general, as scarcity increases, the macroeconomy shifts away its usage of these resources. The speed with which that occurs is a function of the availability of substitutes. For those factors of production that remain in the increasingly scarce natural resource sector, the opportunity cost of production rises.
3 This does not deny that certain natural resource industries such as certain agricultural commodities resemble this.
4 Ibid. (Both citations in paragraph).
5 I am indebted to Toshihide Kasutani (MITI) and Hiroshi Kanai (Mitsubishi Kanai Petrochemical) for the expert advice on the economics and 'science' of the chemical industry.
6 See Sutton (1991) for a detailed discussion of this issue.
7 U.S. Congress Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, *Hearings on Administered Prices*, 86th Congress, 2nd Session, Part 20 pp. 11065, 11257 (1960).
8 United States v. Monsanto Co., Farbenfabriken Bayer AG and Mobay Chemical Co., Trade Case ¶ 72,001, p. 83,553 (W. D. Pa. 1967).
9 JFTC Decision 27 December 1972, *Shinketshusu*, 19 (1973), 124 *et seq.*
10 *Bundeskartellamt* Decision, 1972, *Wirtschaft und Wettbewerb* 525–48, Bkart A 1393, 1407, 1411 and 1915.
11 Messerlin claims that in the 1980s, 23% of all anti-dumping cases have been in cartelized sectors in the EU.

12 Although the revised anti-dumping code of the EU requires a 'Community Interest' t it is not entirely clear that the most recent cases (and the soda ash case reviewed in sect 6 of this chapter) have shown that the EU Commission has produced a workable a credible definition of the 'Community Interest'.
13 Messerlin (1990), p. 10.
14 Ibid.
15 Ibid. p. 13.
16 Messerlin (1990), p. 47.
17 Commission Decision of December 19 1990 relating to a proceeding under Article 85 the EEC Treaty IV/33. 133 – A: Soda-Ash – Solvay, ICI (91/297/EEC), recital 3 (O. 152, 15/06/1991).
18 Ibid. recital 5.
19 Isonex Inc. is an engineering consultancy who specializes in soda ash. Websi www.isonex.com.
20 Opcit., 28, recital 12.
21 Ibid.
22 Opcit., 49, recital 2.
23 Ibid.
24 Ibid.
25 Ibid.
26 Source: *Japan's Chemical Industry 1996* produced by the Japan Chemical Indus Association.
27 These are the national state-owned producers predominantly in the Former Yugoslav Bulgaria, Romania and (the then) Czechoslovakia.
28 Source: Isonex Inc.
29 In addition, Elf Acquitaine own Texas Gulf Chemicals Corp.
30 ANSAC was originally formed by three US producers to enter the Japanese market. December 1983, all six soda ash producers had joined ANSAC.
31 The EU soda ash manufacturers and the EU Commission point out that part of increase in US exports to the EU may be explained by the loss of market share in Chi This would be probably due to the necessity for US firms to avoid capacity cuts and her rising costs.
32 Opcit., 28, recital 3.
33 Ibid.
34 It is a common view held by EU Commission anti-dumping administrators that in ca involving firms in market economies, dumping occurs because of forms of cross-subsi In the official documents used by the EU Commission in the administration of this case strong theme was on the US firms' positioning in other markets (especially Asian ones
35 Commission Regulation (EEC) No 823/95.
36 A confidential industry source.
37 The views of a confidential industry source that expressed dismay at the activities of firms, describing them as 'cowboys'.
38 See following pages for a chronological list of the anti-dumping actions taken by the Commission in this industry.
39 Ibid.
40 *Financial Times*, December 21 1990.
41 Ibid.
42 The Community v. Solvay et Cie SA and Imperial Chemical Industries Plc, Case I 33.133–A, 4 CMLR, p. 468.
43 The Community v. Solvay et Cie and chemische Fabrik Kalk (Case IV/33.133–B) [199 4 CMLR p. 482.
44 Opcit., 29, recital 1.

Exhibit 17-1

January 22, 1982.

[redacted]

Alaskan Tanner Crab Investigation

Gentlemen:

You have requested my advice as to the legality under Japanese law of certain activities of [redacted] in connection with the purchase of Alaskan tanner crab during the 1980 season.

F A C T S

The facts, as you have presented them to me, are as follows:

Japanese Purchases of Alaskan Seafood

Seafood is a major component of the Japanese diet. On a per capita basis, the Japanese people are the world's largest consumers of seafood. Most of the high-price seafood consumed in Japan is imported. In recent years, an increasing percentage of Japanese seafood imports have come from the United States, particularly from the state of Alaska.

During the past decade, [redacted] Japanese companies have become actively involved in the importation of tanner crab (both bairdi and opilio) from Alaska. During the 1980 season, for example, approximately 30 Japanese companies purchased Alaskan tanner crab for importation into Japan; some 21 of these companies each imported more than 100 metric tons (223,000 pounds) of tanner crab from Alaskan sources. In the 1980 season, [redacted] purchased over 850,000 pounds of Alaskan tanner crab--over 625,000 pounds from Morpac, a joint venture in which [redacted] and [redacted] each have 46 percent interest, and over 225,000 pounds from Pan Alaska Fisheries, a subsidiary of Castle and Cooke, Inc., a large United States corporation. In 1980, Japanese

purchases of Alaskan tanner crab totalled more than 28 million pounds.

Responsibilities of the Fishery Agency

Under Japanese law, the primary responsibility for regulation of the importation and marketing of marine products (including tanner crab) is entrusted to the Fishery Agency of the Ministry of Agriculture, Forestry and Fisheries. In certain areas, the Fishery Agency shares this responsibility with the Ministry of International Trade and Industry ("MITI").

Because of the important place of seafood in the Japanese diet, the Fishery Agency has long been concerned with the potentially serious adverse effect on the Japanese consumer of unduly high seafood prices. The Fishery Agency has been especially interested in preventing speculative purchases of major seafood products by importers; such speculative purchases, if made without adequate regard for the supply and demand situation in the Japanese market, can lead to rapid and undesirable fluctuations in the price of seafood to consumers. For example, speculative purchases of herring roe by Mitsubishi resulted in extraordinarily high prices for that product during the 1979 holiday season. These prices in turn led to a consumer boycott of herring roe and contributed to the bankruptcy of a leading herring roe company. Moreover, because of the greatly increased volume of Japanese imports of seafood (a trend which was intensified by the adoption in 1976 of a 200 mile fishing limit by the United States), the Fishery Agency has striven to prevent such imports from having a detrimental impact on domestic production of seafood.

Administrative Guidance

Because of these concerns, the Fishery Agency has repeatedly directed Japanese importers to maintain an orderly market in the importation of seafood and to avoid excessive competition in the buying of seafood products from foreign sources. These directives covered all imported marine products (including tanner crab). The directives were issued by, among others, the General Manager and Deputy General Manager of the Fishery Marketing Department of the Fishery Agency and were made with the knowledge and approval of the Director General of the Fishery Agency. The first such directive was issued in the fall of 1979 and this directive was reiterated through the entire 1980 tanner crab season. In accordance with Japanese practice, these directives were delivered orally by the responsible officials at meetings with the affected companies. The Fishery Agency's directives concerning the maintenance of an orderly seafood

market were the subject of extended discussion in the House of Representatives (Standing Committee on Agriculture, Forestry and Fisheries) of the Japanese Diet on February 20, 1980 and in the House of Councilors (Standing Committee on Budget) on March 14, 1980.

As explained by a high official of the Fishery Agency in an interview held a short time ago [redacted], the directives to the importers to maintain an orderly market and to avoid excessive competition* in buying seafood meant essentially this: the importers, in purchasing seafood from foreign sources, were to take due account of the supply and demand situation in the Japanese domestic market and to refrain to the extent possible from purchasing seafood at such high prices as would increase significantly the Japanese wholesale price.

JMPIA

The Japanese Marine Products Importers Association ("JMPIA") was formally established in September 1979 at the urging of MITI with the consultation and approval of the Fishery Agency. JMPIA had existed as an informal organization for more than ten years prior to its formal extablishment. [redacted] all of the [redacted] leading Japanese importers of marine products are members of JMPIA. [redacted] most of the leading Japanese importers of Alaskan tanner crab were during the 1980 season also members of the Crab Committee of JMPIA.

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* [redacted]

In accordance with the Fishery Agency's directive to maintain orderly marketing and to avoid excessive competition, [redacted] many of the [redacted] leading Japanese importers exchanged certain information concerning the Alaskan tanner crab market. These exchange took place principally in connection with Crab Committee meetings. Among the topics discussed were general market conditions including such matters as Japanese supply and demand for tanner crab, the quality of Alaskan crab available, and the progress of negotiations between Alaskan processors and crab fishermen. For purposes of this opinion, I shall assume that participants on occasion also exchanged information concerning their current offering prices for tanner crab and their thoughts concerning possible future offering prices. These information exchanges related in large part to negotiations with one of the processors, Pan Alaskan Fisheries.

I have been advised [redacted] that at all times it exercised its independent business judgement concerning the quantities it would buy and the prices it would offer for tanner crab (taking into account the administrative directives it had received from the Fishery Agency) and that it never entered into any agreement with any other importer concerning the prices to be paid for Alaskan tanner crab or the quantities of crab to be purchased.

Grand Jury Investigation

The United States Department of Justice has been conducting a grand jury investigation of the Alaskan seafood industry in general and Alaskan tanner crab in particular. The Department is currently considering whether or not to seek a criminal indictment of [redacted] Japanese importers under the Sherman Antitrust Act for allegedly conspiring to fix the prices at which they purchased Alaskan tanner crab during the 1980 season.

QUESTIONS PRESENTED AND CONCLUSIONS

You have sought my advice as to the following questions:

1. Whether the Fishery Agency acted within the proper scope of its authority in issuing to the importers the administrative directives described above?

In my opinion, the answer to this question is quite clearly in the affirmative. The Fishery Agency has broad powers and responsibilities with respect to the importation and marketing of marine products, and administrative guidance of the type described plays an important role in the Japanese system of regulating and controlling business enterprises.

2. Whether [redacted] was obliged to comply with the administrative guidance issued by the Fishery Agency with respect to importation of marine products?

The answer to this question is in my opinion also clearly in the affirmative. No responsible Japanese company would refuse to comply with administrative guidance issued by a competent government agency. Non-compliance would have serious practical consequences for the non-complying company.

3. Whether the exchange of price information between competitors, or an agreement by competitors to exchange price information, is prohibited by Japanese antimonopoly legislation, in the absence of an actual agreement between those competitors to fix prices?

In my opinion, the answer to this question is in the negative.

ANALYSIS

1. Whether the Fishery Agency acted within the proper scope of its authority in issuing its administrative directives with respect to the importation and marketing of marine products?

Article 3 of the law establishing the Ministry of Agriculture, Forestry and Fisheries (May 31, 1949, Law No.153, as amended) designates the Ministry (to which the Fishery Agency is attached) as the administrative agency responsible for performing administrative duties and undertakings directed to, among other things, the improvement and development of the fishery industry, the promotion of the welfare of those involved in the fishery industry, and the provision of a stable supply of seafood to the Japanese people. Article 3(2) of the Establishment Law directs the Ministry to "work for promotion, improvement and coordination of trade and consumption of ... fishery products; drinks and foods; oils and fats; and those articles which are used exclusively for agruicultural, forestry, livestock and fishery industry."

Articles 73 and 74 of the Establishment Law authorize the Fishery Agency to exercise the powers and responsibilities of the Ministry with respect to fishery products. Among the powers thus delegated to the Fishery Agency is the power to control the price of seafood products:

> "Ministry of Agriculture, Forestry and Fisheries the following powers to execute its duties stipulated in this law, provided, however, that the powers shall be exercised in accordance with any law or regulation thereunder:
>
> . . .

15. Control prices etc. pertaining to the products falling within its duties."

Establishment Law, Article 4(15). See also Price Control Order Article 4 (March 3, 1946, as amended) (empowering responsible minister to control prices if prices increase or are likely to increase significantly and it is difficult to secure stability of prices through other means), Law Concerning Emergency Measures for Stabilization of Citizen's Life, Sections 1, 3, 16 and 17 (authorizing price controls and other measures in connection with extraordinary price hikes involving life-related products). An English translation of the pertinent portions of the Establishment Law is attached as Appendix A hereto.

Given the broad statutory responsibilities of the Fishery Agency with respect to the marketing and importation of marine products, there can be no real question but that the Fishery Agency acted within the proper scope of its authority in advising the importers to engage in orderly marketing and to avoid excessive competition in buying foreign marine products. In analyzing this point, it is important to have a proper understanding of the vital role played by administrative guidance in carrying out the work of Japanese administrative agencies.

Administrative guidance plays a very important rôle in controlling Japanese import and export trade. Indeed, it is probably fair to say that administrative guidance is the core around which all the legal measures for controlling international trade converge. Despite its importance, however, "administrative guidance" is not a concept which is readily amenable to precise legal difinition. One of the better difinitions of administrative guidance was provided by a senior official of Cabinet Legislation Bureau in a statement before the Committee on Commerce and Industry of the House of Councilors on March 26, 1974:

"(Administrative guidance) is a request or a guidance on the part of the Government within the limit of the task and administrative responsibility of each agency as provided for in the Establishment Laws, asking for a specific performance or inaction for the purpose of achieving some administrative objective by the cooperation on the part of the parties who are the object of administration."

While there are several different types of administrative guidance,* the actions of the Fishery Agency with respect to importation of marine products plainly fall into the category of regulatory administrative guidance. Because of the respect and deference which Japanese businesses have traditionally paid to government directives (a deference which traces back to the system of imperial government prior to the Second War), Japanese administrative agencies have far less necessity than their American counterparts to achieve their objectives by formal rules or regulations or by statutory order. Instead, these objectives can frequently be achieved far more efficiently by informal administrative guidance.

Applying these principles to our situation, the administrative guidance from the Fishery Agency to the tanner crab importers to engage in orderly marketing and avoid excessive competition in buying was an exercise of governmental power which properly set policy to be followed by the importers. The Fishery Agency has a broad statutory mandate to regulate the fishery industry and imports of marine products. The fact that the Agency's directives to the importers were largely oral does not diminish in any way the authority of the administrative guidance provided. Administrative guidance in Japan frequently takes the form of face-to-face communications from the responsibile governmental official to officers of the affected companies.

2. Whether [redacted] was obliged to comply with the administrative guidance of the Fishery Agency to engage in orderly marketing and avoid excessive competition in the buying of foreign marine products?

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* Other types of administrative guidance including promotional administrative guidance (for example, government assistance in improving management of small enterprises) and adjudicatory administrative guidance (for example, mediation by a government agency of a dispute between private businesses).

In one sense, of course, compliance with administrative guidance is not compulsory. Administrative guidance is by its very nature informal and no specific sanctions are provided for its violation. To conclude from this, however, that Mitsui was free to disregard the administrative guidance provided by the Fishery Agency would be quite erroneous. Not only did Mitsui have a strong obligation under Japanese custom and tradition to follow the Agency's guidance, but non-compliance might well have had serious practical consequences. The combined effect of these factors is to render formal legal sanctions for non-compliance essentially superfluous.

First, as noted above, under Japanese custom Japanese companies usually have no alternative but to comply with governmental guidance. As a consequence, deliberate non-compliance by a responsible Japanese company with the administrative guidance of a government agency is very rare.

Second, deliberate non-compliance with government directives would subject the offending company to severe governmental criticism and might seriously complicate the offending company's future relations with the government agency in question. Moreover, non-compliance in this case would quite possibly result in increase of domestic seafood prices which would certainly be subject to severe public criticism.

In these circumstances, it is my opinion that Mitsui had no realistic alternative but to comply with the administrative guidance issued by the Fishery Agency.

3. Whether the exchange of price information between competitors, or an agreement by competitors to exchange price information, is prohibited by Japanese antimonopoly legislation, in the absence of an actual agreement between those competitors to fix prices?

Such an information exchange would not by itself violate Japanese law. The exchange of price information between competitors, or an agreement between competitors to exchange price information, is not prohibited under Japanese antimonopoly legislation in the absence of an actual agreement (express or implied) to fix, raise or stabilize prices. Under some circumstances, of course, an exchange of price information between competitors could be some evidence of a price-fixing agreement. Such an information exchange, however, would not, without more, constitute conclusive proof of the existence of such a conspiracy.

In our case, if the importers exchanged price information pursuant to the administrative guidance received from the Fishery Agency and if this contributed to the stabilization of Japanese domestic seafood prices, such an exchange would be in accordance with Japanese public policy and would not, in my view, constitute violation under Japanese antimonopoly legislation.

As your United States counsel has described American Antitrust law to me, the exchange of price information between competitors, or an agreement between competitors to exchange such price information, may constitute a violation of the Sherman Act even in the absence of a price-fixing agreement, where the effect of the information exchange is to raise or stabilize prices at non-free-market levels. See, e.g., United States v. Container Corporation, 393 U.S. 333 (1969). As noted above, the doctrine thus described is not recognized under Japanese law.

Very truly yours,

Mitsuo Matsushita

Mitsuo Matsushita

Exhibit 18

CASE COMMENTS

DAISHOWA INTERNATIONAL v. NORTH COAST EXPORT: AN ALTERNATIVE APPROACH IN THE JUDICIAL BALANCING OF INTERNATIONAL COMITY CONSIDERATIONS

In August 1974, several U.S. wood chip manufacturers, including North Coast Company, Inc., formed a Webb-Pomerene export association, North Coast Export Cooperative, Inc. (North Coast), to obtain a limited exemption from the Sherman Antitrust Act.[1] Later that year, in the course of its business dealings, North Coast entered into a long-term contract to provide wood chips to Daishowa International (Daishowa), a Japanese importer.[2]

On February 3, 1981, Daishowa sued North Coast for an alleged breach of that contract. During the discovery process, North Coast uncovered evidence of possible antitrust violations by the Japanese importer and subsequently amended its answer to include antitrust affirmative defenses and counterclaims.[3]

Claiming a "reciprocal exemption" from the antitrust laws, Daishowa filed a motion to strike the antitrust allegations.[4] Daishowa argued, alternatively, that the application of U.S. antitrust laws under the facts of the case would violate principles of international comity, irrespective of the question of reciprocal exemption.[5] The court rejected these arguments and held that Daishowa was not entitled to reciprocal exemption from U.S. antitrust laws.

1. The American Wood Chip Association was formed in accordance with the provisions of the Webb-Pomerene Act. 15 U.S.C. §§ 61-65 (1976). For a discussion of the Webb-Pomerene Act, see *infra* notes 9-10 and 14-15 and accompanying text.

2. Daishowa International v. North Coast Export, 1982-2 TRADE CAS. (CCH) ¶ 64,774, at 71,786 (N.D. Cal. 1982).

3. *Id.* For a discussion of the bases for North Coast's antitrust allegations, see *infra* note 22.

4. 1982-2 TRADE CAS. (CCH) at 71,786.

5. *Id.*

According to the court, considerations of international comity did not preclude the assertion of U.S. extraterritorial jurisdiction over Daishowa's actions.[6]

The *Daishowa* holding merits close examination because of the increasing potential for conflict between the United States and its major trading partners over the extraterritorial application of U.S. antitrust laws. Indeed, an analysis of the interaction of the Webb-Pomerene exemption and comity considerations suggests that the *Daishowa* decision gives rise to a double standard, the international perception of which may serve only to hamper U.S. international trade relations.

This Case Comment first will describe the Webb-Pomerene exemption to the Sherman Act and its application to the *Daishowa* litigation. The Comment next will examine the general policies which underlie the *Timberlane*[7] "balancing approach" and alternative approaches to extraterritorial assertion of U.S. antitrust laws. The Comment then will compare the *Daishowa* court's application of the *Timberlane* test with prior judicial interpretations. Finally, the Comment will propose an alternative approach in the judicial balancing of international comity considerations.

BACKGROUND

The Webb-Pomerene Antitrust Exemption

Congress enacted the Webb-Pomerene Export Trade Act[8] in 1918 to provide associations engaged solely in export trade with a limited exemption from the Sherman Act.[9] The exemption was established to enable U.S. producers and manufacturers to meet

6. *Id.* at 71,788-90.

7. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

8. 15 U.S.C. §§ 61-65 (1976).

9. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade occurring either in interstate commerce or international commerce. 15 U.S.C. § 1. The Webb-Pomerene Act, however, provides antitrust immunity for any association established "for the sole purpose of engaging in export trade" and for agreements made by its members for acts done in the course of export trade. 15 U.S.C. § 62. This exemption is circumscribed by the condition that neither the export association nor its acts or agreements may: "(1) Restrain trade within the United States; (2) Restrain the export trade of any domestic competition of the association; (3) Artificially or intentionally enhance or depress prices within the United States of commodities of the class exported by such association." *Id.*

aggressive competition from powerful foreign combinations operating in world markets.[10]

Of the several cases which have clarified the scope and conditions of the Webb-Pomerene exemption,[11] the decision in *United States v. Minnesota Mining & Manufacturing Company*[12] remains the most widely followed. That court held that an export association could not establish or operate jointly-owned production facilities abroad.[13] The *Minnesota Mining* court also delineated acceptable Webb-Pomerene activity.[14] Because the enumerated activities were normal

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10. *See* FEDERAL TRADE COMMISSION, WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW 6 (1968). Congressional reports indicate that Congress intended primarily to protect small firms that were financially unable to conduct individual export trade programs. *Id.* at 4. Congress also intended to permit firms which competed with cartels abroad to export cooperatively (presuming that this would allow them to reduce their export costs), expand effective demand for their products abroad, and gain access to export markets on improved terms. *Id.* For a discussion of the controversy that surrounded the passage of the Act, see generally *id.* at 4-8.

The Justice Department and, to a greater extent, the Federal Trade Commission, administer and enforce the Webb-Pomerene Act. The Act requires every association engaged solely in export trade to file a statement with the Federal Trade Commission within 30 days of its creation, as well as annual statements detailing the association's conduct and business during the preceding year. 15 U.S.C. § 65. For a discussion of early FTC interpretations of the Act, see Diamond, *The Webb-Pomerene Act and Export Trade Associations,* 44 COLUM. L. REV. 805 (1944).

11. *See, e.g.,* United States v. United States Alkali Export Ass'n, 58 F. Supp. 59, 70-71 (S.D.N.Y. 1944); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968) (Webb-Pomerene Act provided no exemption for the price-fixing and quota-setting activities of defendants where burden of noncompetitive pricing fell on United States and foreign elements of the transaction were relatively insignificant); *aff'd*, 325 U.S. 196 (1945) (international agreement between Webb-Pomerene export association and foreign companies which allocated exclusive markets, fixed prices on an international scale, and sold through joint agents violated Sherman Act).

12. 92 F. Supp. 947 (D. Mass. 1950).

13. *Id.* at 963.

14. *Id.* at 965. The *Minnesota Mining* court stated that the following practices were consistent with the provisions of the Webb-Pomerene Act:

> The recruitment of four-fifths of an industry into one export unit. . . [t]he assignment of stock in an export association according to quotas . . . [the] firm commitments of members to use the unit as their exclusive foreign outlet, the refusal of the unit to handle the exports of American competitors, the determination of what quotas and at what prices each member should supply products to the unit, the fixing of re-sale prices at which the unit's foreign distributors should sell and the limitation of distributors for handling products of the members.

Id.

features essential to the stability of any joint enterprise, absent their unfair or oppressive use in a particular setting, the court reasoned that the activities were within the license granted by the Act.[15] The justifications for, and purported advantages of, the Webb-Pomerene exemption remain highly controversial.[16]

The Facts in Daishowa

On February 3, 1981, Daishowa International, a Japanese paper manufacturer,[17] brought an action in the federal district court for the Northern District of California against North Coast Export Company and North Coast Export Cooperative, Inc., a Webb-Pomerene association,[18] for alleged breach of contract.[19] During the

15. *Id.* The court also determined that:

> [I]t may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus, every export company may be a restraint. But if there are only these inevitable consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of congressional will that such a restraint shall be permitted.

Id.

16. *See generally* McDeermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 WASH. & LEE L. REV. 105 (1980).

17. Daishowa International imports wood chips from worldwide suppliers, including North Coast Export Cooperative. Plaintiff's and Third Party Defendant's Memorandum of Points and Authorities in Support of Their Motion to Strike Defenses and to Dismiss Counterclaims, at 2, Daishowa Int'l v. North Coast Export, 1982-2 TRADE CAS. (CCH) ¶64,774, (N.D. Cal. 1982) [hereinafter cited as Daishowa Memorandum].

18. As required by 15 U.S.C. § 65, the North Coast Combines, as a member of the American Wood Chip Association, are registered with the FTC as associations engaged solely in export and, as such, qualify for exemption from U.S. antitrust laws under the Webb-Pomerene Act (Copies of the Articles of Association and By-laws of the American Wood Chip Association, as well as the required annual FTC report are on file at the offices of *Law & Policy in International Business*).

19. In 1974, Daishowa and North Coast entered into a contract whereby North Coast would supply wood chips to Daishowa for an eleven year period. Daishowa Memorandum, *supra* note 17, at 71,786. North Coast alleged that the contract was subject to several conditions precedent, including obtaining financing to construct an export facility. Memorandum of Points and Authorities in Opposition to Counterclaim and Third-Party Defendants' Motions to Dismiss and to Strike, at 2, Daishowa Int'l v. North Coast Export, 1982-2 TRADE CAS. (CCH)¶64,774, (N.D. Cal. 1982) [hereinafter cited as North Coast Memorandum]. Daishowa alleged that North Coast repudiated the wood chip contract in 1980 when the market price of wood chips exceeded the contract price, and sued to enforce the agreement. Daishowa Memorandum, *supra* note 17, at 2. North Coast defended that it was

course of discovery, North Coast uncovered evidence of possible antitrust violations by Daishowa and its U.S. subsidiaries and by other major Japanese paper manufacturers and their U.S. subsidiaries.[20] Accordingly, the court granted North Coast leave to amend its answer to include antitrust affirmative defenses and counterclaims.[21] North Coast alleged that the Japanese purchasers of wood chips exported from North America had been operating as a buyers' cartel. Through this combination, North Coast claimed, the foreign companies were dividing the North American suppliers among themselves, fixing the price for export wood chips and boycotting North Coast for refusing to accept Japanese trading conditions.[22]

In its reply, Daishowa brought a motion to strike the antitrust affirmative defenses and to dismiss the antitrust claims[23] in the third-party complaint on the grounds that Daishowa was entitled to an implied reciprocal exemption from U.S. antitrust laws for alleged

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forced to terminate the contract in January 1981 when Daishowa repudiated its commitment to pay the market price for wood chips. North Coast Memorandum, *supra*, at 2.

20. North Coast stated in its memorandum that it had been unable to find any buyer for its export wood chips, despite its willingness on two occasions to sell the chips at auction below market prices. North Coast Memorandum, *supra* note 19, at 3.

21. 1982-2 TRADE CAS. (CCH) at 71,786. North Coast asked the court to enjoin Daishowa and the other Japanese companies from continuing the boycott and to require Daishowa to purchase North Coast's wood chips. *Id.* at 71,790.

22. North Coast Memorandum, *supra* note 19, at 3-4. North Coast cited notes of meetings of the North America Chip Committee of the Japan Paper Manufacturers Association which indicated that each U.S. seller had been allocated to a Japanese buyer who led in negotiations with the seller and which alluded to the employment of collusive strategy. *Id.* at 3. The quoted portion of the note stated: "It was agreed that we will no longer use the method of negotiating based on the market price in North America, but rather negotiate with the theory on how the chips should be." *Id.*

To buttress its antitrust allegations, North Coast claimed that no Japanese paper company had submitted a bid to North Coast since the contract had been terminated. Yet, the Japanese companies continued to make spot purchases of wood chips at prices higher than North Coast had offered to sell its product. *Id.* at 4. North Coast also asserted that there were several companies which indicated that they would be willing to buy from North Coast only if North Coast transferred its chips to another company's dock. *Id.* These acts allegedly depressed the market price of wood chips artificially along the entire Pacific Coast and threatened to destroy the North Coast Export Cooperative. *Id.*

23. A motion to strike is appropriate to eliminate from the pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. FED. R. CIV. P. 12(f). The court stated that it will not grant a motion to strike if the insufficiency of the defense is not clearly apparent, or if the defense raises factual issues that a court should determine in a hearing on the merits. 1982-2 TRADE CAS. (CCH) at 71,786-77.

cooperative conduct with other Japanese purchasers in transactions with an exempt Webb-Pomerene Association.[24] Daishowa further argued that, regardless of whether it was entitled to this implied exemption, the court should not apply U.S. antitrust laws according to the principles set forth in *Timberlane Lumber Co. v. Bank of America*.[25]

After conducting a hearing on the motion, the court refused to dismiss or strike North Coast's antitrust claims and defenses.[26] The court first determined that Daishowa was not entitled to a reciprocal exemption from antitrust violations.[27] The court then applied the *Timberlane* balancing test and concluded that it should exercise jurisdiction in light of the severity of the anticompetitive conduct alleged and the foreseeability of the resultant harm.[28]

Comity Considerations

The Timberlane Balancing Approach

In *Timberlane*,[29] the Ninth Circuit developed a set of preliminary guidelines for determining whether a U.S. court should exercise extraterritorial jurisdiction under the antitrust laws in a particular case.[30] In *Timberlane*, the private plaintiff alleged that the

24. Daishowa Memorandum, *supra* note 17, at 5. Daishowa argued that the court should imply this exemption to accomplish the Act's purpose of promoting trade with foreign buying cooperatives and to be consistent with the Act's exemption of U.S. foreign export trade. *Id.*

25. 549 F.2d 597 (9th Cir. 1976). The *Timberlane* court established a balancing approach to the extraterritorial assertion of U.S. jurisdiction which weighs seven factors in making a comity determination. *See* text accompanying note 36. Daishowa argued that the application of U.S. law would not further any clear U.S. government interest. *See* Daishowa Memorandum, *supra* note 17, at 5. The importer claimed that such an exercise would violate and invade Japanese government interests, and thus would be an improper extraterritorial assertion of U.S. antitrust law. *Id.*

26. 1982-2 TRADE CAS. (CCH) at 71,790.

27. *Id.* at 71,790. The court reasoned that it was neither a frustration of the purpose of the Webb-Pomerene Act nor inconsistent with the Act to permit a Webb-Pomerene Association to assert antitrust violations against a foreign cooperative because a Webb-Pomerene Association itself would not be exempt for unfair conduct used to monopolize commerce within the United States. *Id.* at 71,787-88.

28. *Id.* at 71,788.

29. 549 F.2d at 597.

30. The Ninth Circuit formulated a conflict of laws approach which suggests the weighing of seven factors. The same approach is reflected in the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (U.S. Dept. of State, 1976). *See also* text accompanying note 37.

intended result of defendant's conspiracy was to produce a direct and substantial effect on U.S. foreign commerce in violation of the antitrust laws.[31] The Ninth Circuit held that, as a matter of fairness and international comity, the traditional "effects" test[32] governing the extraterritorial application of the U.S. antitrust laws provided an insufficient basis for courts to assert extraterritorial jurisdiction over foreign defendants.[33] The court then set forth a three-part test for determining the circumstances under which a court should assert jurisdiction:

> Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[34]

To consider the third question, a court must evaluate and balance the relevant comity considerations in the case.[35] The Ninth Circuit

31. 549 F.2d at 601. The *Timberlane* plaintiffs alleged that officials of the Bank of America and others located in both the United States and Honduras conspired to prevent Timberlane from milling lumber in Honduras and exporting it to the United States, thus maintaining control of the Honduran lumber export business in the hands of a few select individuals who in turn were controlled by the Bank. *Id.* The Ninth Circuit vacated the district court's dismissal of the antitrust action and remanded the case. *Id.* at 615.

32. The "effects" test was formulated by Judge Learned Hand in United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416 (2d Cir. 1945). This test permits the courts to apply U.S. antitrust laws against acts committed by aliens outside the territorial boundaries of the United States which intentionally affect U.S. foreign commerce. *Id.* at 444. The liberal extraterritorial application of the antitrust laws after *ALCOA* often resulted in conflict with other nations. *See* Address of Sherman Unger, General Counsel of the U.S. Dept. of Commerce, Before the Foreign Trade Association, Jan. 28, 1982, at 7-8 [hereinafter cited as Unger Speech]. Consequently, the *Timberlane* court concluded that the "effects" test failed to take into account other nations' interests and the full nature of the relationship between the actors and the country. 549 F.2d at 611-12.

33. 549 F.2d at 613. The court instead advocated a "jurisdictional rule of reason" which considered whether the effects on U.S. commerce were substantial enough, relative to the foreign policy concerns involved, to justify the assertion of extraterritorial jurisdiction. *Id.* at 613-14.

34. *Id.* at 615.

35. *Id.* at 613-15. Under the *Timberlane* approach, the balancing test is considered an integral part of the jurisdictional determination. *See supra* notes 34-36 and accompanying text. *See also* J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §6.13 at 166 (2d ed. 1981) (discussing the integral part that the balancing process plays in the jurisdictional issue of the *Timberlane* case).

suggested that the seven factors to be weighed include:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[36]

After assessing the conflict, the court must determine whether U.S. contacts and interests are "sufficiently strong, vis-a-vis those of other nations, to justify the assertion of extraterritorial authority."[37]

The Mannington Mills Approach

While the *Timberlane* court held that a court should review considerations of international comity as part of the threshold jurisdictional decision, a different application of the balancing test emerged in *Mannington Mills, Inc. v. Congoleum Corp.*[38] The *Mannington Mills*

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36. *Id.* at 614.

37. *Id.* Speaking for the Department of Justice, John H. Shenefield, Associate Attorney General, expressed a similar view in a discussion of the extraterritorial application of U.S. antitrust laws by the Department. John Shenefield, Remarks Before the International Law Institute and the American Bar Association's International Law Section (Dec. 10, 1980), *reprinted in* 1981 TRADE REG. REP. (CCH) ¶50,424 at 55,959 (Feb. 2, 1981) [hereinafter cited as Shenefield Speech]. Shenefield noted the manner in which the Justice Department carefully balances the U.S. interest in prosecuting a particular antitrust restraint against conflicting foreign interests. *Id.* at 55,960. He stated that:

> Our approach to international cases is not the one used by private plaintiffs when they file treble damage actions. Unlike the United States government, private firms hurt by restrictive business practices abroad do not have treaty or foreign policy obligations to consider, nor considerations of the national interests of foreign nations, or even of our own nation.

Id.

38. 595 F.2d 1287 (3d Cir. 1979). The plaintiff in *Mannington Mills* sued its competitor, Congoleum, for violation of the antitrust laws, claiming that the defendant had blocked U.S. competitors overseas by fraudulently obtaining patents in many foreign nations. *Id.* at 1290. The Third Circuit remanded the case for the application of a balancing test to

court applied the traditional "effects" test,[39] considering only the direct and intended effects of the alleged activity in the determination of the threshold jurisdictional issue. The Third Circuit endorsed the *Timberlane* foreign relations approach only as a secondary test used in an abstention analysis to determine whether jurisdiction *should* be exercised.[40] Under the *Mannington Mills* view, courts have jurisdiction whenever there is any effect on U.S. commerce.[41] As such, the balancing analysis does not go to the existence of

determine whether the exercise of subject matter jurisdiction was appropriate. *Id.* at 1294–98. The court expanded the balancing test to include ten factors:

> (1) degree of conflict with foreign law or policy; (2) nationality of the parties; (3) relative importance of the alleged violation of conduct here compared to that abroad; (4) availability of a remedy abroad and the pendency of litigation there; (5) existence and foreseeability of intent to harm or affect American commerce; (6) possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) whether an order for relief would be acceptable in the U.S. if made by the foreign nation under similar circumstances; (10) whether a treaty with the affected nations has addressed the issue.

Id. at 1297–98.

39. *Id.* at 1291–92. For a discussion of the effects test, see *supra* note 32 and accompanying text.

40. The majority in *Mannington Mills* did not acknowledge this analytical difference, glossing over it in their endorsement of the *Timberlane* test. 595 F.2d at 1297. Judge Adams' concurring opinion, however, made it clear that the court employed an abstention analysis:

> I do not agree that a court may conclude that it is invested with the subject matter jurisdiction under the Sherman Act but may nonetheless abstain from exercising such jurisdiction in deference to considerations of international comity; rather, it seems that those considerations are properly to be weighed at the outset when the court determines whether jurisdiction vel non exists, or in fashioning the decree.

Id. at 1299.

Thus, while *Timberlane* and *Mannington Mills* reveal a similar interest in comity and conflict issues, *Timberlane* calls for a jurisdictional analysis while *Mannington Mills* calls for more of an abstention analysis. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.13 at 165. Moreover, while *Mannington Mills* leaves the *ALCOA* "effects" standard untouched, *Timberlane* lowers the magnitude of effect necessary for the threshold test, requiring only "some" actual or intended effect. 549 F.2d at 613.

The Justice Department has noted this difference in approach. *See* Shenefield Speech, *supra* note 37, at 55,961–62. A recent case, Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680, 687–88 (S.D.N.Y. 1979), has also distinguished the *Timberlane* and *Mannington Mills* approaches on these grounds.

41. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.13.

jurisdiction, but to whether the court, in its discretion, should decline to exercise jurisdiction.[42] This treatment of the balancing test narrows the scope of appellate review of the trial court's determinations on balancing issues and permits the conclusion that the courts may waive the balancing test.[43] The federal courts have split in their adherence to either of these distinct decisions to resolve issues involving the extraterritorial reach of U.S. antitrust laws.[44]

ANALYSIS

The Daishowa Decision

The court's analysis in *Daishowa* emphasized the gravity of the anticompetitive conduct alleged and the foreseeability of the resultant harm without actually focusing on international comity concerns, the heart of the *Timberlane* test.[45] Moreover, while North Coast's Webb-Pomerene status may not have been a sufficient reason to extend reciprocal immunity, the exemption was a relevant factor in the comity balance which the court failed to consider. The court instead excluded issues of reciprocity from its balancing of comity considerations.[46]

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42. *Id.*

43. *Id. See also In Re* Uranium Antitrust Litigation, 617 F.2d 1248, 1255-56 (7th Cir. 1980) (court reviewed district court's jurisdictional conclusion within abuse of discretion framework and appeared to regard jurisdictional issue as waived by foreign defendants' default).

44. For those cases which have adopted the *Timberlane* approach, see, *e.g.*, Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981); Wells Fargo & Co. v. Wells Fargo Express, 556 F.2d 406, 427-30 (9th Cir. 1977); National Bank of Canada v. Interbank Card Association, 507 F. Supp. 1113, 1120 (S.D.N.Y. 1980).

For those cases supporting the *Mannington Mills* abstention approach, see, *e.g.*, Industrial Investment Development Corp. v. Mitsui & Co., Ltd., 671 F.2d 876, 884 n.7 (5th Cir. 1982); *In re* Uranium Antitrust Litigation, 617 F.2d 1248, 1255 (7th Cir. 1980); Conservation Council of Western Australia, Inc. v. Aluminum Company of America (ALCOA), 518 F. Supp. 270, 275-76 (W.D. Pa. 1981).

45. *See* 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,786. For the *Timberlane* test, see *supra* text accompanying note 36.

46. Although the first part of the court's opinion dealt exclusively with North Coast's Webb-Pomerene status and possible reciprocal exemptions, those factors never appeared in the court's eventual balancing of what it deemed to be the relevant considerations. *See id.* at 71,789-90.

The court began by noting that the procedural posture of a motion to strike suggested that Daishowa had a heavy burden of proof.[47] The court then correctly pointed out that neither the Webb-Pomerene Act nor its legislative history mentioned immunity from antitrust laws for foreign cooperatives doing business with U.S. Webb-Pomerene cooperatives.[48] The court concluded that it was neither a frustration of the purpose of the Webb-Pomerene Act nor logically inconsistent to permit a Webb-Pomerene association to assert antitrust violations against a foreign cooperative.[49]

The court's determination that no reciprocal immunity existed, however, was not supported by a finding that Daishowa's activities actually had gone beyond the limited exemption granted to U.S. Webb-Pomerene associations.[50] Instead, the court apparently assumed that the antitrust laws apply whenever any possible foreign anticompetitive effect is felt in the United States. *Timberlane*, in contrast, requires that more than an effect on U.S. foreign commerce be shown and mandates a balancing of the interests involved.[51]

After assuming the inapplicability of a reciprocal exemption and reviewing the *Timberlane* balancing test, the court concluded that "[d]ue to the serious nature of the anticompetitive conduct alleged, and the foreseeability of the harm occurring from the alleged activities," the balance of factors under *Timberlane* required the court to refuse to dismiss or strike North Coast's antitrust claims and defenses.[52] To support this conclusion, the court relied on the Ninth Circuit's suggestion in *Timberlane* that dismissal under Rule 12(b)(1) without the benefit of Rule 56(e)[53] discovery by the plaintiff

47. In addressing this aspect of the case, the court noted that as "striking a portion of the pleading is a drastic remedy and often used as a dilatory tactic," motions to strike are infrequently granted and "[c]ourts have even less sympathy for them in antitrust litigation." *Id.* at 71,786. The court then indicated that it would not grant the present motion to strike "if the insufficiency of the defense [was] not clearly apparent, or if it raise[d] factual issues that should be determined on a hearing on the merits." *Id.* at 71,786-87.

48. *Id.* at 71,787.

49. *Id.* The court reasoned that because North Coast was not totally immune from the Sherman Act, a foreign cooperative like Daishowa, acting in violation of U.S. antitrust law, had no basis to assert reciprocal immunity. *Id.* at 71,787-88.

50. Indeed, the court stated that the allegations raised substantial questions under the Sherman Act which North Coast should be permitted to pursue in discovery. *Id.* at 71,788. This question will not be resolved until the entire case is heard on the merits.

51. *See supra* notes 32-37 and accompanying text.

52. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,790.

53. The court in *Timberlane* noted that Rule 56 summary judgment treatment under the

"perhaps" would be sustainable "if it could be shown that defendants' activities had no effect on U.S. foreign commerce and were intended to have none."[54] The *Daishowa* court failed to recognize that this language was directed to the standard for summary judgment under Rule 56(e) in extremely complex antitrust litigation, and had nothing to do with the standard for the tripartite test set out later in the *Timberlane* opinion.[55] Thus, contrary to the *Timberlane* decision, the *Daishowa* court failed to measure the impact of international comity considerations. Furthermore, while the court quoted the Ninth Circuit's mandate that several elements be weighed in the comity evaluation,[56] the court's opinion provides no guidance as to the eventual balance of those factors.[57]

Instead, the court apparently employed the *Mannnington Mills* abstention analysis,[58] concentrating on the intended effects of the alleged conduct and giving only secondary consideration to comity concerns. In essence, the *Daishowa* court resolved the threshold jurisdictional issue when, under a Webb-Pomerene analysis, it determined that Daishowa's alleged conduct fell within the purview of the Sherman Act.[59] The court employed the *Timberlane* analysis only to determine whether it should abstain from exercising jurisdiction, and not to resolve the threshold jurisdictional question, as

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Federal Rules of Civil Procedure is not required for a 12(b)(1) dismissal. 549 F.2d at 602. Yet even if a party is secured Rule 56 treatment, it does not necesssarily follow that the party is entitled to full discovery under Rule 56(e), in order for dismissal under 12(b)(1) to be sustainable. *Id.* at 602-03 n.6.

54. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,788. The court went on to state that "[t]his is a rigorous standard for Daishowa to meet in order for this Court to grant dismissal of North Coast's antitrust claims. By application of the three-part *Timberlane* analysis, this Court may determine whether such a standard has been met." *Id.*

55. Indeed, the standard for exercising jurisdiction under *Timberline* is whether, in face of the degree of conflict with foreign law or policy, the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction. 549 F.2d at 614-15. In fact, the Ninth Circuit stated that the district court's judgment, which held only that the restraint involved did not produce a direct and substantial effect on U.S. foreign commerce, did not satisfy any of the relevant inquiries. *Id.* at 615. Accordingly, the Ninth Circuit vacated the district court's dismissal due to insufficient evidence on the comity question. *Id.*

56. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789. For the *Timberlane* factors which the *Daishowa* court cited, see *supra* text accompanying note 36.

57. *See generally infra* notes 60-82 and accompanying text.

58. *See supra* notes 38-44 and accompanying text.

59. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,788.

Timberlane requires.

Moreover, after making this jurisdictional determination, the court failed to consider the arguments in favor of a reciprocal exemption in the broader context of potential conflict with foreign law or policy. Thus, the *Daishowa* court erred by using the *Timberlane* test as only a secondary line of analysis and by giving inadequate consideration to potential conflict with foreign law or policy when it did eventually weigh the comity factors.

Degree of Conflict with Foreign Law or Policy

The *Timberlane* analysis involved a balancing of competing interests.[60] While the Ninth Circuit noted that "[a] *difference* in law or policy is one likely sore spot,"[61] ironically, it ppears that the *similarity* of U.S. and Japanese law in this area was an aggravating factor in the *Daishowa* case. In fact, as Daishowa asserted,[62] Japan specifically exempts certain import associations from its own Antimonopoly Law[63] through the Export-Import Transactions Law.[64]

Under article 19-(4) of the Transactions Law, a qualifying import association, according to its articles, may fix price, quantity, quality, or any other matter related to the import trading of the same

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60. *See supra* notes 34–36 and accompanying text.

61. 549 F.2d at 614 (emphasis added).

62. Daishowa Memorandum, *supra* note 17, at 24–25. It is unclear why the court asserts that Daishowa did not cite the applicable Japanese law, as there are several citations within the memorandum. The court apparently confused the issue of whether Daishowa actually meets the requirements set out by the law, a separate issue which is addressed *infra*, at note 69.

63. DOKUSEN KINSHI HO (Antimonopoly Law) Law No. 54 of 1947 [hereinafter cited as the Antimonopoly Law]. The development of the Antimonopoly Law in the years following its enactment in 1947 has been marked by considerable fluctuation in the degree of rigidity in its enforcement. Matsushita, *The Antimonopoly Law of Japan,* 11 LAW IN JAPAN 57 (1978). The years 1947 to 1952 were marked by energetic enforcement of the Law's terms. *See Id.* Enforcement in the following years, through the mid-1960s, however, was significantly relaxed. *See id.* Since the mid-1960s the law has been enforced with renewed vigor for a variety of reasons: the continuous inflation during this period, the rise in consumerism, the liberalization of trade and capital transactions, and a shift in the goals of economic policy from high growth to welfare. *See id.* The Antimonopoly Law was amended in 1977 to strengthen its provisions and to toughen its enforcement. *Id.* at 58.

64. YUSHUTSUNYUU TORIHIKI HO (Export & Import Transactions Law) Law No. 299 of Aug. 5, 1952 *as amended, reprinted in* 5 EHS Law Bulletin Series (1969) [hereinafter cited as the Transactions Law].

or similar commodities,[65] upon approval from the Minister of International Trade & Industry (MITI).[66] Article 33 of the Transactions Law stipulates that the provisions of the Antimonopoly Law do not apply to matters relating to import trading that have been fixed through obtaining the approval required by article 19-(4).[67] As with the Webb-Pomerene Act, however, only a limited exemption is granted.[68]

Daishowa relied heavily on this Japanese exemption in its memorandum in support of its motions to dismiss and to strike, noting the irony of requiring the Japanese to respect the U.S. exemption, but not requiring U.S. exporters to respect the Japanese exemption.[69] Although consideration of foreign relations is really the heart of the *Timberlane* formulation, the Daishowa court never

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65. To qualify as an association exempted from application of the Antimonopoly Law, certain conditions must exist, and the measures taken must be necessary to eliminate those conditions. *Id.*, art. 7-(2). Cause for such measures is said to exist in any of three circumstances: (1) where the trade with respect to the commodity to be imported is restrained at the place of shipment or in the importing of other foreign countries from the place of shipment; or where, excessive competition in the import trading results in conspicuously disadvantageous terms and conditions being offered to the Japanese, as compared to the import trading terms offered to other foreign countries or the domestic trading terms; (2) where the commodity must be imported from a specific country due to an international arrangement between governments and such importation is, or is likely to become, difficult because the price is excessively higher than that of other countries or the quality is conspicuously different from that available from other countries; (3) where it is likely that it will become difficult to secure a commodity produced by exploitation of foreign resources because the exploitation of those resources cannot be undertaken or is likely to become difficult. *Id.*

66. *Id.*, art. 19-(4), para. 22.

67. *Id.*, art. 33.

68. For instance, there is no exemption from the Antimonopoly Law when "unfair business practices" are used or encouraged. *Id.*, art. 33-(1).

69. *See* Daishowa Memorandum, *supra* note 17, at 24-25. In its memorandum, North Coast responded that no conflict in fact arises unless Daishowa and its alleged co-conspirators qualify for the Japanese import exemption. North Coast Memorandum, *supra* note 19, at 19 n.7. While Daishowa never expressly addresses this issue, it is implicit in its memorandum and reply memorandum that Daishowa comes within the exemption. *See* Daishowa Memorandum, *supra* note 17, at 24. In addition, North Coast cited a Japanese newspaper article which indicated that "Daishowa Seishi" was ordered to pay a fine for illegal cartel organization as an illustration of Japanese condemnation of activities in restraint of trade. North Coast Memorandum, *supra* note 19, at 19. In the present case, however, the fact that Daishowa was operating pursuant to the MITI authorization required by Article 19-(4) of the Transactions Law appears to be irrelevant. *See supra* notes 65-66 and accompanying text.

confronted this important issue and quickly dismissed the Japanese contentions: "It is not clear from the comity and fairness discussions whether a conflict of law exists. Daishowa does not cite the applicable Japanese law."[70] Thus, due to its narrow focus on the alleged activities' effect on U.S. foreign commerce, the court ignored the fact that it is the potential similarity of U.S. and Japanese law which gives rise to the present conflict. Furthermore, the court summarily dismissed another area of potential friction with Japanese antitrust law—the different manner of its enforcement as compared with that of the United States.[71]

Additional Comity Considerations

The *Daishowa* court also failed to address other fundamental questions of comity and fairness in its analysis. The *Timberlane* opinion explicitly designates the nationalities of the parties as a factor to be weighed in the analysis.[72] The *Daishowa* court, however, spoke solely of the "great interest in providing a convenient forum and a prompt remedy" because the "party asserting the antitrust violations [was] an American corporation."[73] This approach completely overlooked Japan's identical concern in providing a swift and convenient remedy for its nationals.[74] The court further failed to give weight to the fact that Daishowa's alleged anticompetitive conduct occurred primarily in Japan.[75] Instead, the court placed great emphasis on the fact that both parties were present in a U.S. court, a reliance which appears misplaced in light of the breach of

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70. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789. *See also supra* note 62 (noting that Daishowa did cite the applicable Japanese law even though the court said otherwise). It is not clear from *Timberlane* whether a rigorous analysis of the foreign law, such as the *Timberlane* court required, is a prerequisite to the balancing test.

71. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789-80. Unlike in the United States, private suits for damages on the basis of the Antimonopoly Law have yet to play a large role in Japan. *See* Matsushita, *supra* note 63, at 58. Instead, most of the enforcement has been done by an administrative agency, the Fair Trade Commission (FTC). *Id.*

72. The Ninth Circuit in *Timberlane* stated that, "Nationality is another [likely sore spot]; though foreign governments may have some concern for the treatment of American citizens and business residing there, they primarily care about their own nationals." 549 F.2d at 614.

73. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789.

74. One of the *Timberlane* court's criticisms of the "effects test" was that it failed to consider this foreign interest. *See supra* notes 32-33 and accompanying text.

75. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789.

contract issue involved in that suit.[76]

While the court devoted a considerable portion of its opinion to the effect of the alleged activity on U.S. foreign commerce, little consideration was given to similar, possibly detrimental, effects on Japanese commerce. Stating that "there [was] no evidence of harm to the Japanese economy from the alleged activities,"[77] the court failed to weigh the possible impact that a penalty of treble damages could have on the Japanese trading interests involved.[78] The court further exposed the inadequacy of its "balancing" by stating that "no remedy may be available under Japanese antitrust law for this American corporation."[79] This determination overlooks Japan's similar interest in not having its nationals subjected to punitive damages of potentially devastating proportions.

It thus becomes clear why the *Daishowa* court based its refusal to dismiss the antitrust claims on the "serious nature of the anticompetitive conduct alleged, and the foreseeability of the harm occurring from the alleged activities":[80] little else was considered in the "balancing" conducted. By returning to the traditional effects test,[81] the *Daishowa* court did little to advance the *Timberlane* concern for fundamental considerations of comity and fairness and repercussions in the international sphere. To the contrary, the *Daishowa* decision may intensify "[t]he heat which [the] United States antitrust laws continue to engender among nations which are otherwise friendly to the United States . . . ."[82]

Policy Implications

The *Daishowa* court failed to weigh adequately the background of international protest against the extraterritorial application of U.S.

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76. The court did not address Daishowa's suggestion that the traditional contract issues in the suit be considered separately from the issue as to whether Daishowa's activities were illegal under U.S. antitrust laws. Daishowa Memorandum, *supra* note 17, at 18.

77. 1982-2 TRADE CAS. (CCH) ¶64,774 at 71,789.

78. *Id. See* Daishowa Memorandum, *supra* note 17, at 18-19 (discussing the great concerns to U.S. trading partners worldwide arising from the potentially devastating impacts of a treble damage penalty).

79. 1982-2 TRADE CAS. ¶64,774 at 71,789-90.

80. *Id.* at 71,790.

81. *See supra* note 32 and accompanying text.

82. Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697, 698 (1982).

antitrust laws against which the action was set.[83] Within the last two decades there has been dramatic growth in the number of private antitrust actions brought in the United States.[84] This increase is significant because the United States remains one of the few countries with a private right of action for injuries arising from antitrust violations, and the only country that rewards successful plaintiffs with treble damages.[85] Accordingly, British observers have written that "the plaintiff claiming triple damages in proceedings in the United States . . . is perceived abroad as a menace."[86] Unlike the government, the private plaintiff need not balance national interests in litigating a particular anticompetitive restraint against conflicting foreign interests.[87]

Although "[d]ifferent countries have different views as to the proper role of the civil law in the protection of free trade,"[88] many countries do exempt export and/or import associations from their respective antitrust laws.[89] Thus, the combining of such exemptions with the traditional effects doctrine, as employed by the *Daishowa* court,[90] gives rise to what may be perceived abroad as a double standard: "United States antitrust laws insist that foreign exporters act competitively in the international market, while the Webb-Pomerene Act allows United States exporters to act anticompetitively in that same market."[91]

Foreign governments increasingly have become more forceful in expressing their concern over the extraterritorial application of the

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83. For a discussion of increasing foreign sensitivity to the application of U.S. antitrust laws abroad, see *id.*

84. In 1960, less than three hundred private antitrust suits were filed in the United States. Shenefield Speech, *supra* note 37, at 55,961. In the year ending June 30, 1980, 1,457 suits were filed—a five-fold increase. *Id.*, citing ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, table 22 at 63 (1980).

85. Shenefield Speech, *supra* note 37, at 55,961. As already noted, in Japan there are rarely private suits for a violation of the Antimonopoly Law. *See supra* note 71 and accompanying text.

86. Pettit & Styles, *supra* note 82, at 698.

87. Shenefield Speech, *supra* note 37, at 55,960.

88. Pettit & Styles, *supra* note 82, at 698.

89. *Id.* at 699. Among the countries granting such an exemption are the United States, the United Kingdom, Canada, West Germany, Japan and Australia. *Id.*

90. For a discussion of the *Daishowa* court's application of the effects test, see *supra* note 58 and accompanying text.

91. Pettit & Styles, *supra* note 82, at 699.

U.S. antitrust laws. One response of foreign states has been to enact blocking statutes and other countermeasures designed to minimize the impact of U.S. antitrust enforcement, such as the recapture of treble damage awards.[92] Hence, decisions such as *Daishowa* can only serve to antagonize our foreign trading partners by undermining the sensitivity U.S. courts recently have shown to this international reaction and to the limits which international law and comity should impose on national regulatory policy.[93]

Ironically, against this backdrop of sensitivity to the extraterritorial application of U.S. antitrust laws, foreigners confront antitrust-exempt U.S. export associations seeking to apply U.S. antitrust laws to foreign nationals, similarly exempt under their own laws, for associating with other companies. From an international perspective, it is unclear why U.S. companies have a better claim to ignore the Japanese exemption than Japanese companies would have to ignore the U.S. exemption.[94] With the increasing possibility of foreign retaliation against the operation of Webb-Pomerene associations,[95] the United States may soon confront more vigorous extraterritorial application of foreign antitrust laws.

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92. These blocking statutes, which may obstruct foreign discovery in U.S. antitrust actions or impede the recovery of antitrust awards, have been enacted by Great Britain, Canada, Australia, South Africa, the Netherlands, Italy, West Germany, Japan and Australia. *See generally* Pettit & Styles, *supra* note 82.

93. The Department of Justice has also begun to show greater sensitivity to the interests of foreign governments and international comity in its enforcement policy, as demonstrated by its endorsement of the *Timberlane* approach. *See* Shenefield Speech, *supra* note 37, at 55,961; *see also* THE DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), *reprinted in* [Jan.-June] Antitrust & Trade Reg. Rep. (BNA), No. 799, at E-1, E-2, E-3 (1977).

94. *See supra* note 27 and accompanying text.

95. A striking example of foreign retaliation is the recent action taken by the Commission of the European Communities (EC Commission) against the Pulp, Paper & Paperboard Export Association of the U.S. (commonly called the Kraft Export Associaton or KEA) for alleged price fixing. *See* Unger Speech, *supra* note 32 (discussing trade issues central to U.S. foreign policy). A Justice Department summary of informal consultations held on January 14, 1982 in Paris states: "The [European] Commission considers that export associations whose activities have substantial anticompetitive effects in the Common Market may violate community competition law, even if the activities are authorized in the association's home country." [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1050 at 267 (Feb. 4, 1982).

ALTERNATIVE APPROACHES TO THE APPLICATION OF THE *Timberlane* FORMULA

The *Daishowa* court apparently followed the *Mannington Mills* approach by treating the balancing prong of the *Timberlane* tripartite test as essentially nonjurisdictional. The preferable approach, however, is to treat the balancing process as an integral part of the jurisdictional determination, as the *Timberlane* court's treatment of the issue clearly intended.[96] As *Timberlane* suggests, the second part of the tripartite test, which relates to the nature and magnitude of the restraint,[97] should bear on the substantive and not the jurisdictional scope of the Sherman Act.[98] This approach leads to a two-step analysis: Does the court have subject matter jurisdiction under the *Timberlane* comity analysis? If so, does the complaint state a cause of action under the Sherman Act?

Thus, the "effects" element of the *Timberlane* test is "jurisdictional" only in the narrow sense that the complaint must state a claim under the Sherman Act to survive a motion to strike.[99] Applying this analysis to the present case, in ruling on the motion to dismiss the *Daishowa* court should have treated the nature and extent of the impact of Daishowa's activities as a question of substantive law, rather than as a question of jurisdiction.

Yet, no federal court has applied the full scope of the *Timberlane* comity considerations within the antitrust context.[100] The frustration with which federal judges have faced this balancing task was

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96. *See supra* notes 31-37 and accompanying text. This is the view adopted by Atwood and Brewster, authors of AMERICAN BUSINESS ABROAD. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.13.

97. The second element of the tripartite test involves the question whether the alleged restaint is "of such a type and magnitude so as to be cognizable as a violation of the Sherman Act." *Timberlane,* 549 F.2d at 615.

98. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.13.

99. *Id.*

100. *Id.* at § 6.15. Judge Choy, in I.A.M. v. OPEC, 649 F.2d 1354 (9th Cir. 1981), considered the *Timberlane* factors, but found instead that the act of state doctrine precluded adjudication of the case.

manifested in the *In Re Uranium* case.[101] Indeed, "[i]f the ultimate issue presented by *Timberlane* and *Mannington Mills* is framed in terms of which country is most intensely interested in the case at bar and whose policies should therefore prevail, understandably the American judiciary may feel it is being asked to choose between being unpatriotic or disingenuous."[102] Moreover, the courts are often not in a good position to judge the magnitude of foreign government interest.[103]

In light of these inherent difficulties, the judiciary should adopt an alternative perspective on the *Timberlane* balancing process, by viewing the process as a balancing of two different U.S. interests: "the possible benefits of applying American antitrust laws to the conduct in question, compared to the possible damage to U.S. political and economic foreign policies if the court proceeds with a suit under circumstances where foreign governments object to the assertion of jurisdiction."[104] This approach puts the balancing process into a form which is familiar to the courts[105] and reflective of the reasons why the U.S. government has endorsed the relevance of comity

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101. In the *In Re* Uranium Antitrust Litigation, discovery was resisted by defendants on the grounds that it would offend foreign countries where the documents were located by violating their non-disclosure laws. 480 F. Supp. 1138 (N.D. Ill. 1979). Judge Marshall responded:

> Several defendants cite the Restatement, Second, Foreign Relations Law of the United States, § 40(a) or rely on broad notions of "international comity" for the proposition that we should balance the vital national interest of the United States and the foreign countries to determine which interests predominate. Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy.... It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.

Id. at 1148, *quoted in* J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.16.

102. J. ATWOOD & K. BREWSTER, *supra* note 35, § 6.17.

103. *Id.* This is particularly true where there are private parties involved that may not have access to U.S. or foreign government sources that could aid the court. Atwood and Brewster also reject as a reliable standard a possible inference of disinterest of the foreign government from the fact that it fails to appear as *amicus curiae*. *Id.*

104. *Id.*

105. Such an approach raises issues similar to those which the court must address under principles of conflict of laws and the act of state doctrine. *Id.*

considerations in antitrust jurisdiction.[106] In this way, the judiciary can assess "whether its exercise of jurisdiction over an international controversy will be perceived abroad as so excessive as to be, on balance, damaging to American interests."[107]

Conclusion

The *Daishowa* court struggled with the difficult task of balancing international comity factors in conjunction with the foreign relations problems raised by the Webb-Pomerene Act. Yet, the court's decision was, in reality, an application of the traditional "intended effects" test which never focused on the comity factors that comprise the *Timberlane* analysis. The court also erred in its secondary line of analysis by not giving adequate consideration to the degree of conflict with foreign law.

The *Daishowa* result produces a double standard which can serve only to intensify foreign hostility towards the extraterritorial application of U.S. antitrust laws. To alleviate this growing tension with our international trading partners, the judiciary should apply the *Timberlane* balancing formula consistently as part of the threshold jurisdictional determination.

In addition, results more consistent with notions of international comity can be achieved in the future if the burden of balancing U.S. interests directly against foreign interests is approached in a different light. The judiciary would be better able to fulfill this task and to weigh principles of international comity if it balanced the U.S. interest in applying its antitrust laws against the U.S. interest in preventing the erosion of its foreign relations. The continuing foreign challenge to the competitive position of the United States demands that mutual respect and sensitivity be shown by U.S. and foreign courts; a failure to meet this objective will effectively negate the protection that each country desires to afford its companies.

Cheryl R. Adler

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106. *Id.*
107. *Id.*

Exhibit 19

Case Note

Preserving Per Se

United States v. Nippon Paper Indus., 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

> "[W]e do not have two versions of antitrust law, one for international transactions and one for domestic: to the extent the law applies at all, it applies in a nondiscriminatory fashion."[1]

In 1995, the Department of Justice indicted Nippon Paper Industries of Japan for conspiring with other Japanese firms to fix prices on thermal fax paper sold in the United States, in violation of section 1 of the Sherman Anti-Trust Act.[2] In 1997, the First Circuit upheld the indictment,[3] becoming the first court to extend the jurisdictional reach of the Sherman Act to a criminal conspiracy formed solely among foreign firms.[4]

Yet the First Circuit decision and its subsequent implementation by the district court did not create a jurisdictional threshold that, once crossed, sets the typical antitrust prosecution in motion. To the contrary, *Nippon Paper* established a new element of the *substantive* offense—proof of "substantial effects"—that applies solely in international prosecutions. Not only does the new doctrine produce different substantive requirements for domestics and foreigners, it also undermines a half-century of case law holding that, once a particular restraint of trade is deemed illegal "per se"—as it was in

1. Diane P. Wood, The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction, Address Before the ABA Antitrust Section Spring Meeting (Apr. 5, 1995), *available in* 1995 WL 150745, at *2.

2. 15 U.S.C. § 1 (1994) ("Every contract . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

3. *See* United States v. Nippon Paper Indus., 109 F.3d 1, 9 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998). The district court had dismissed the case for lack of subject matter jurisdiction. *See* United States v. Nippon Paper Indus., 944 F. Supp. 55, 66 (D. Mass. 1996) ("[T]he criminal provisions of the Sherman Act do not apply to conspiratorial conduct in which none of the overt acts of the conspiracy take place in the United States.").

4. *See Nippon Paper*, 109 F.3d at 4 (describing "a criminal prosecution for solely extraterritorial conduct" as "uncharted terrain"). The alleged conspiracy did not merely include foreign firms but was formed abroad, at a meeting in Japan.

this case—effects need not be proven to convict.

After providing a brief background of the "per se rule," this Case Note outlines how courts have undermined the rule through their reluctance to subject foreigners to its forceful presumptions. The Case Note argues that the rule should be applied consistently against all defendants. One way to do this is to separate jurisdiction from substance, thereby allowing courts to make the jurisdictional determination of effects using presumptions that both comport with the rule's emphasis on efficiency and follow naturally from per se doctrine.

I

The First Circuit based its decision in *Nippon Paper* on *Hartford Fire Insurance v. California*,[5] a civil antitrust action in which the Supreme Court held that the Sherman Act applied abroad, provided "foreign conduct . . . meant to produce and did in fact produce some substantial effect in the United States."[6] The First Circuit extended the jurisdictional authority further, holding that *Hartford Fire* applied in the criminal context.[7] At trial, the district court put the question to the jury; but rather than separate the jurisdictional inquiry from the merits, the court included the *jurisdictional* effects requirement in its charge on the elements of the *substantive* offense.[8] In July of 1998, the trial ended with a hung jury.

Nippon Paper creates a conflict within criminal antitrust doctrine by requiring that effects be proven to find a substantive "per se" violation of the Sherman Act. The case was the first wholly foreign criminal antitrust action prosecuted under the per se rule, one of the two substantive frameworks used to decide antitrust cases. Under the other framework, the rule of reason, the circumstances justifying the restraint are balanced against the restraint's anticompetitive effects.[9] The per se rule, however, precludes consideration of either the effects of the restraint or the reasons for it.[10] The per se rule is potent because negative effects are *presumed*. Moreover, it is

5. 509 U.S. 764 (1993).

6. *Id.* at 796. While one might argue that the jurisdictional language in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) must also be examined, the FTAIA does not apply to import commerce. *See* 15 U.S.C. § 6a (1994); *see also Hartford Fire*, 509 U.S. at 796 n.23 (declining to place weight on language in the FTAIA); *Nippon Paper*, 109 F.3d at 4 (same).

7. *See Nippon Paper*, 109 F.3d at 9 (holding that "the Sherman Act applies to wholly foreign [criminal] conduct which has an intended and substantial effect in the United States").

8. *See* Record at 2127, 2138, 2199, *Nippon Paper* (Cr. No. 95-10388-NG). The judge listed a "number of different ways" to find substantial effects, including whether the volume of commerce or the share of the market was substantially affected by the conspiracy and whether competition in the entire market was substantially lessened by the conspiracy. *See id.* at 2199.

9. *See, e.g.*, Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) (defining considerations under the rule of reason).

10. *See infra* text accompanying note 31.

efficient because that presumption "avoids the necessity for an incredibly complicated and prolonged economic investigation."[11] As such, criminal antitrust prosecutions typically target only per se offenses.[12]

For more than fifty years, the Supreme Court has held that price-fixing agreements like that in *Nippon Paper* are per se illegal, relieving the government of its burden to prove their effects.[13] The Court, however, also has indicated that using presumptions to find elements of the crime may be unconstitutional.[14] Hence the significance of the *Nippon Paper* charge: By importing the jurisdictional effects requirement into the elements of the substantive offense, the court dispossessed the per se rule of its powerful presumptions.

II

Courts justified undermining the per se rule for foreigners based on comity principles.[15] The notion that it is somehow unfair to subject foreigners to U.S. law—even absent a conflict of laws—makes courts reluctant to use the per se presumptions against them. *Nippon Paper* provides one of two bad ways to reach the same bad result.

One way courts have eroded the per se rule for foreigners has been to try to preserve it through nonuse. Recognizing that an effects requirement is inconsistent with the per se presumptions, courts before *Nippon Paper* refused to apply the rule to foreign criminal conspiracies. Instead, they explicitly adopted the rule of reason for offenses that, but for the foreign defendant, would have been prosecuted under the per se framework.[16] The result is an asymmetric doctrine: Foreigners are tried under the far more forgiving rule of reason for the same offense that subjects U.S. parties to the per se rule.[17]

The First Circuit, by contrast, broke new ground in deciding that Nippon Paper would be prosecuted under the per se standard, not the rule of

11. Catalano, Inc. v. Target Sales, 446 U.S. 643, 646 n.9 (1980).

12. *See* DEP'T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 2 (1995) [hereinafter GUIDELINES] ("Conduct that the Department prosecutes criminally is limited to traditional per se offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging . . . .").

13. *See, e.g.*, *Catalano*, 643 U.S. at 650; United States v. Socony-Vacuum Oil, 310 U.S. 150, 224 n.59 (1940).

14. *See* Francis v. Franklin, 471 U.S. 307, 313 (1985) (holding unconstitutional presumptions related to elements where these presumptions may be understood by the jury as mandatory, conclusive, or requiring rebuttal); Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (same).

15. *Cf. Nippon Paper*, 109 F.3d at 8 ("[C]omity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.").

16. *See, e.g.*, Metro Indus. v. Sammi Corp., 82 F.3d 839, 843 (9th Cir. 1996) ("Because conduct occurring outside the United States is only a violation of the Sherman Act if it has a sufficient negative impact on commerce in the United States, per se analysis is not appropriate.").

17. *Cf.* Albert A. Foer, *The Political-Economic Nature of Antitrust*, 27 ST. LOUIS U. L.J. 331, 337-38 (1983) ("[W]hen the rule of reason is applied, the defendant virtually always wins.").

reason.[18] The court even recognized the per se presumptions, stating that, "'conduct regarded as per se illegal'" has "'unquestionably anticompetitive effects.'"[19] The district court, however, precluded the use of those presumptions by including effects as an essential element, thereby requiring the government to prove the conspiracy's impact. *Nippon Paper*'s doctrine thus is not only asymmetric, but internally inconsistent. A per-se-plus-effects test for only foreigners raises the burden of proof for their conviction. Moreover, a per se rule that requires proof of effects is not a per se rule at all; it is a rule of reason and should be acknowledged as such.[20]

Either way, the presence of a foreign defendant does not justify weakening the per se rule. Every indictment of a non-U.S. party follows an executive branch decision that "the importance of antitrust enforcement outweighs any relevant foreign policy concerns."[21] Once that decision is made, courts should not undermine it by trying foreigners under weaker rules. The importance of enforcement particularly outweighs comity concerns in cases such as *Nippon Paper*, where foreigners specifically conspire to harm American consumers.[22] Indeed, the Sherman Act's substantive requirement of intent ensures that those convicted knowingly conspired to restrain U.S. trade. *Hartford Fire* also holds that comity is not a factor absent a conflict between domestic and foreign law.[23] The First Circuit recognized that *Hartford Fire* "stunted"[24] the comity doctrine.

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18. *See Nippon Paper*, 109 F.3d at 7 (holding that "the instant case falls within [the per se] rubric" and treating it as such).

19. *Id.* (quoting United States v. United States Gypsum Co., 438 U.S. 422, 440 (1978)).

20. The Department of Justice has stated that, although effects may be relevant ex ante to establish jurisdiction, on the merits "the standards themselves operate in a non-discriminatory fashion." Wood, *supra* note 1, at *4. Yet a per se standard that adds a substantive element to the offense for foreign offenders only is anything but nondiscriminatory.

21. GUIDELINES, *supra* note 12, at 15; *cf. id.* ("The Department does not believe it is the role of the courts to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.").

22. *See* 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273c4, at 395 (1997) (opposing extra comity considerations in cases like *Hartford Fire*, where "foreign insurers, selling a product in the United States, conspired . . . to exclude . . . American firms from the market—an alleged agreement whose only intended effect would be felt in the United States"). In *Nippon Paper*, the government claimed the conspirators specifically fixed a price, in U.S. dollars ($20), for sales in the North American market.

23. *See* 509 U.S. 764, 798-99 (1993) (noting that the "only substantial question is whether there is in fact a true conflict between domestic and foreign law" and, finding no conflict, holding that "[w]e have no need . . . to address other considerations . . . on grounds of international comity" (internal citation and quotation marks omitted)). *But cf. id.* at 812-13 (Scalia, J., dissenting) (arguing that courts must also consider whether Congress has asserted regulatory power over the foreign conduct); Timberlane Lumber v. Bank of America, 549 F.2d 597, 613-14 (9th Cir. 1976) (creating a test balancing effects with comity, allowing jurisdiction to be denied even upon finding effects to be present); 1 SPENSER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 6:10, at 28-29 & nn.4-10 (3d ed. 1997) (noting *Timberlane*'s acceptance before *Hartford Fire*).

24. *Nippon Paper*, 109 F.3d at 8 ("[Comity's] growth in the antitrust sphere has been stunted by *Hartford Fire*, in which the Court suggested that comity concerns . . . defeat . . . jurisdiction