Exhibit 4
Trade regulations and trade remedies

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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 (Kanzai-ho), the Customs Tariff Law (Kanzai Teitoku-ho) and the Temporary Tariff Measures Law (Kanzai Zantei Sochi-ho). 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 Kawanoyori Gaikoku Boueki-ho) 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 Kanzai-tei) and Cabinet Ordinance on Export Trade Control (Yubatsu Boueki Kanzai-tei) 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-sho, 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 beer 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 Disease 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 customs duty and apply for import permission (yoyakyoke) 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 (yoyu-shinin) imposed on 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 provides for import quota. Goods which need import quotas are made public by METI in Import Public Notice (Yanuky Kobyo) 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 places 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, horticultural 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 (Kokomin) 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 clearance
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, psychopharmaceuticals, 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 (IPR) effective within the territory of Japan and dead copy which violates Unfair Competition Prevention Law (Fusai Kyoryo Boeki-ho). 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 (Tsunyo-shiiken ken), design right, trademark right, copyright and copyright-related right, integrated semiconductor circuits right, and seedling right (Kusaiya 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 penalize 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 recognize that a particular good pending import permission is an infringing good. The Verification Application Procedure (Honya Sashitone Moushibate Seido) and the Verification Information Provision Procedure (Honya Sashitone Joshou Tokyo Seido) are procedures for the IPR holder to provide Customs with necessary information to recognize 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) that 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 recognizes 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 (Tsushinsa) 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 right holder 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 (Shobutsu 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 (Shobutsu kyoka) and an export authorisation (Shobutsu shomin) 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 Annex 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 eddy f), (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 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 ferro silicon 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 ferro silicon 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 textiles, shibake mushrooms and mashes 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 (Yabutsusonya Toribiki-bou) is a piece of legislation to create certain export and import controls (commonly referred to as Dokusen Kimbou) 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 to protect national renown at that time. The latter policy interest is undeniable 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

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I. The Development of the Case
J Power is a stock company established under the laws of Japan. It was established as a government-owned company in accordance with the Promotion of Electric Power Development Act of 1952 ("EPDA"). 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. 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. 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. 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 outstanding shares of a

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2 The word "company" is the English translation of the Japanese kabushiki kaisha that corresponds to a business company, public company, Aktien Gesellschaft or Société Anonyme.
3 Dogen Kihatsu Sokuushin 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.
particular Japanese company conducting a designated business, the investor has
to give prior notice of the acquisition to the Minister of Finance and the specific
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. 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 (3) 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:

(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 wholesaler 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

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7 Article 27 (3) of Foreign Exchange and Foreign Trade Act (Act No. 228 of 1
December 1945). An English translation is appended at the end of this article.
8 See: https://www.mof.go.jp/jouhou/kokkikan/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 at least 10 per cent and the Return on Assets (ROA) target 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.  

The person who received the recommendation 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.  

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.  

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 to the press release on the order to abandon the inward direct investment, 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).  
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 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." 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. In the context of civil law, the words "public order and good morals" are understood to convey 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; 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.

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52 Article 3 Public Order and Security
The provisions of this Code shall not prevent a Member from taking action which it considers necessary for:
4) the maintenance of public order or the protection of public health, morals and safety.
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No. 1 of Cabinet Secretariat and other ministries regarding Inward Investment. If a foreign investor intends to acquire more than 10 percent 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 "öffentliche 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 ELEU adds defense of the state law to the


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maintenance of public order as permissible objectives."

Moreover:

"None of the tribunals ... fully define the contours of the permissible objectives of "essential security" and "public order.""

"(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."

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. The biggest problem of this kind of vague and ambiguous

20 ditto, 337.
21 ditto, 340-341.
22 ditto, 355-355.
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 interests groups. With regard to the similarly vague notion of "national security," it has been pointed out that the risk 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.\textsuperscript{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 request 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.\textsuperscript{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.\textsuperscript{26}

\textsuperscript{24} Matthew R. Byrne, NOTE: Protecting National Security and Promoting Foreign Investment: Maintaining the Exos-Florio Balance, 67 Ohio St. L.J. 49, 890.
\textsuperscript{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 meeting27 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

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 regulations 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, railroad, 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

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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
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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.\textsuperscript{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

\textsuperscript{13} See generally Matahita, '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 premised 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 transactions 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 Sub-contractors 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.

A. ENTERPRISE

In principle, the AML is applied to an 'enterprise'. 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 and the Medium and Small Enterprises Organizations Law 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

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16 In Japanese, it is 'gyōsha'.
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.\textsuperscript{19} The premise 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,\textsuperscript{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 premise 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.

E. 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 associations.

\textsuperscript{19} See, for details, Matsushita, \textit{Keizai Gaiyaku} (Introduction to Economic Law) (Tokyo, 1988), 40-4.

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.\textsuperscript{21} In the Chūō-redi-Teikoku-seima case,\textsuperscript{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.\textsuperscript{23} In such a case, a sub-product constitutes a particular field of trade.

\textit{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.\textsuperscript{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.

\section*{D. \textit{Substantial Restraint of Competition}}

\textit{Competition}

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

\begin{quote}
\begin{itemize}
\item 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
\end{itemize}
\end{quote}

\textsuperscript{21} \textit{United States v. E.I. du Pont de Nemours \\ \\ & Co., 351 US 377 (1956).}

\textsuperscript{22} \textit{See Közei-tori-hiki Inkai (The Fair Trade Commission), n. 5, above, pp. 199–202.}

\textsuperscript{23} \textit{United States v. Guerlain, Inc., 153 F. Supp. 77 (SDNY 1957).}

\textsuperscript{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.
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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

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.
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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 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. 57–61.
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

29 See Matsushita, n. 19, above, p. 60.
30 See n. 29, above.
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. w-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 defendant Toshiba Machine Co. (hereinafter, "defending company") and the personal histories of the defendants X and Y:

Shibaura Machine Manufacturing Company (established on 18 March 1949) merged with Shibaura Machinery 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 3,780 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 defendants 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 guided 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 defendant Torihaya Machine Co., placing its head office at 4-2-11 Ginza, Chuo-ku, Tokyo, is a resident which produces and sells machine tools. The defendant X, director of the machine tool business department, was engaged in manufacturing machine tools. The defendant 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 ¥23,560,000) without legal exemption and the Minister's consent, from Daikoku wharf, in Tsurumi ward, Yokohama, Kanagawa Prefecture, to the Ilchewsk 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 calculators, 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 Mitsubishi 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 defendant, Toshiba Machine Co. An imprisonment of 10 months for the defendant X, and a prison term of 1 year for the defendant Y. The defendants 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 Exchange 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. 375, 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 ensued, 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-
2. Meanwhile, the defendants 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 knowledge 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 defendants confidentially produced and designed the Numerical Control device to be remodeled and installed into a five-axis control machine later in the Soviet Union. During the exporting of machines, the company designed the machine into a latter 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 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 software, they were already remodeled with the NC device and in operation in the Soviet Union, with the cooperation of Kongsberg; and although the defendants (especially X) did not have knowledge of understanding on each law and article, as revealed in the testimony of their investigation; it is natural to consider that the defendants certainly realized that the export was in violation of the COCOM rules. Even from a more lenient perspective, the defendants, 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 tripling 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 Kunigai, 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 false 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 defendants 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 interfered 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 defendants X and Y both took part in this case of crime, but there are sympathetic circumstances we should take note of. The defendants followed their superiors' instructions and had not personal aim for profit. 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 defendants who followed company instructions to be punished would be unfair, while other personnel
related to the case will merely leave the office. The defendants 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


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

On 27 September 1977, a U.S. Marine Corps RF-4B 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 ¥140,721,529. 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 Article 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 nearly 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 a 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 governments. 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, (d) 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 obliged 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 Restrict 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 10000 yen to 1 million yen and 20% for lending less than 10000 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 56, 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 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 are 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 Consumer 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-à-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 Tredheim Case and the Korean Incheon 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 is 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 Trosh Hain 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. Heibman & 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 Appendices. 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 suppliers...
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

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. 94/860/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

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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

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\(^3\) 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/30 (June 15, 2001).

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 they receive grants 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 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

In Japan, the basic law governing government procurement is the Account Law. 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, 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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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); Jesse Hallman, Order, U.S. -- Japan Government Procurement Agreements, 14 Wis. Int'l L.J. 1, 1-68 (1993). 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.³

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 Trondheim Case in which the GATT Panel interpreted and applied provisions of the Tokyo Round Government Procurement Agreement and another one is the Korean Incheon Airport Case in which the WTO Panel interpreted and applied provisions of the GPA.

A. The Trondheim Case⁴⁵

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

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³ On the issue, see generally H. YOKI & A. UESSUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN 86-92 (NT: 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.
United States took Norway to the GATT dispute settlement procedures and argued that Norway did not meet the requirement of Article III.15(e) of the Tokyo Round Agreement. Article III.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 III.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 III.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. 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.

The Panel continued to state that, in order to be covered by Article III.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

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11 In this Report, the Panel refers to Article III.16(e). However, Article III.16(e) seems to be irrelevant to the issue here. It must have been Article III.15(e). Therefore, in this chapter, Article III.15(e) is referred to.
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 Incheon Airport Case15

This is a case concerning the construction of Incheon 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 Incheon 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.
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 Incheon International Airport Project was not covered by the Agreement.15

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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15 Id. ¶ 1.36.
17 Id. ¶ 7.99.
18 Id. ¶ 7.116.
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. State 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 state 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.\(^{20}\)


Another issue is the effect of GATT/WTO disciplines on the conduct of state governments in public procurement. Although the Marrakesh Agreement is not a treaty in the sense of the United States Constitution, there are cases in which courts pronounced the state buy national laws were superseded by GATT.\footnote{Baldwin Liman Hamilton Corp. v. Superior Court, 25 Cal. Rptr. 799 (1962); Territory of Hawaii v. Ho, 41 Hawaii 565 (1957). See also, K.S.B. Technical Sales Corp. v. North Jersey Water Supply Comm’n, 75 N.J. 272, 381 A. 2d 774 (1977).}

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 (Myanmar).”\footnote{1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Law, § 7:22 GM, 40 1/2 (1997).} 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.\footnote{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 Chairman of the Panel, WT/DS88/4 (Jan. 11, 1999); WT/DS95/4 (Jan. 11, 1999).} 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\footnote{Nat’l Foreign Trade Council v. Baker, 26 F. Supp. 2d (D. Mass. 1998).} and Court of Appeals\footnote{Nat’l Trade Council v. Natso, 181 F. 3d 35 (C.A. 1 1999).} and then petitioned to the Supreme Court of the United States.\footnote{Crosby v. Nat’l Foreign Trade Council, 520 U.S. 372 (2000).} 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.\footnote{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).} 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
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

28 These cases are briefly summarized in Attachment 6 of the document cited in supra note 6.
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 texts 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.
REFERENCES

Books


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