Addendum-2

INTERNATIONAL ECONOMIC ACTIVITIES AND COMPETITION LAWS

The issue of international economic activities and competition laws discussed here is itself not a question of consistency with WTO rules. However, we examine excessive extraterritorial application of domestic law in terms of violating international law and with respect to efforts on seeking harmonization. While international economic activities are intensifying, the extent to which competition laws, which were originally intended to regulate domestic market, may be applied to cases that occurred outside the country is becoming more and more important. Enforcement jurisdiction refers to whether the competition laws of one country can actually be enforced extraterritorially against a foreign company.

1. EXTRATERRITORIAL APPLICATION

1) Extraterritorial Application of Domestic Laws (Legislative Jurisdiction and its Execution) and the Effects Doctrine

Domestic laws generally apply only to conduct occurring in the country where they are enacted and lose their force at international borders. This concept is known as "the territorial principle" and applies, in principle, to competition laws as well as to other legislation.

In today's global economy, as corporate activities become more international, conduct taking place in one country may have grave effects on markets elsewhere. Therefore, effective regulation cannot always be achieved through strict application of the territorial principle.

To some extent, countries have traditionally applied their competition laws extraterritorially in an attempt to mitigate effects on their own market. An exporting cartel may do damage to competition in an importing country.

In the last few years, developed countries sought to prohibit cartels (*e.g.*, the "OECD Council Recommendation concerning Effective Action Against 'Hard-Core' Cartels" (1998)). Thus, it has become widespread practice in the U.S., the EU and other countries, whose domestic market have been impacted by international cartels, to apply domestic competition laws extraterritorially. This extraterritorial application should be considered in the context of constraining international cartels. It is based on the "effects doctrine"[1] which is the expansion of territorial principle, and the United States, the EU, and a number of other countries (especially within the OECD) support this theory. The principle also has been approved by two of the academic bodies that consider international legal questions: the International Law Association and L'Institut de Droit International. Recognition by these academic bodies does not directly confirm legal validity of the principle, but because these academic bodies play important roles in the formation of international law, their recognition could support the idea of an emerging international understanding.

In Japan, the Research Group on Foreign Issues in the Anti-Monopoly Act, working under the direction of the Fair Trade Commission, published a report in 1990 that affirmed extraterritorial application of competition law under the "effects doctrine." The report stated that, "when foreign companies export goods to Japan and their activities include actions that constitute violations of the Anti-Monopoly Act of Japan, these activities are subject to regulation as violations of the Anti-Monopoly Act." We find this to be an appropriate position.

A study commissioned by the Ministry of Foreign Affairs ("Study on Extraterritorial Application of Competition Law," March 2001) noted that a country had legislative jurisdiction in cases where the matter had a close, substantive, direct and important relation to a matter, and where it is possible to address the matter consistent with international law and principles, such as the practices of countries, a principle of nonintervention and reciprocity and requests for interdependence. This "close relation" element was regarded as one of the basic criteria in determining whether to embark on extraterritorial application.

While not strictly a matter of extraterritorial application, anti-monopoly laws are also being applied to cases in an extraterritorial manner. Examples include (i)The 1998 *Nordion Case*, where a Canadian company attempted to force a Japanese company into an exclusive contract. The Canadian company was issued a recommendation to take appropriate measures due to a violation of Article 3 of the Anti-Monopoly Act; (ii)

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[1] The "Effects Doctrine"

－ **'Restrictive Trade Legislation Committee' of the International Law Association**

The International Law Association approved the effects doctrine as a principle of international law at the 55th Conference in New York in 1972. It found that the effects doctrine provided authority for a state to establish a regulatory framework for actions that occurred outside its borders, but that nevertheless had effects within its territory. The principle allows for the extraterritorial application of domestic laws if the following are met:

(a) The actions and their effects constitute activities that would fall under the scope of regulation within the law;
(b) Significant domestic effects exist; and
(c) The effects are the direct and primarily intended result of extraterritorial actions.

－ **L'Institut de Droit International**

During its session in Oslo in 1977, L'Institut de Droit stated that jurisdiction over regulations governing the anti-competitive activities of multinational enterprises was determined by the effects doctrine. It ruled that the effects doctrine could be applied extraterritorially if the actions had intentional, or at least foreseeable, substantial, direct, and immediate effects within a territory.

Warnings issued to Microsoft in the United States against violation of unfair business practices (2004); and (iii) Exclusion measures order implemented against overseas businesses which formed an international cartel in contravention of Article 3 of the Anti-Monopoly Act (2008). There was also a case where not only cease and desist orders but also orders for payment of surcharge were executed against overseas businesses which formed a price cartel for sales to overseas subsidiaries of Japanese companies, in violation of Article 3 of the Anti-Monopoly Act (2009) (at the time of this writing, however, whether the case falls within the legislative jurisdiction of the Anti-Monopoly Act or not is decided; the trial is pending)[2]. In addition, the Fair Trade Commission frequently conducts merger reviews of M&A cases between foreign businesses (so-called offshore cases). Thus, the Anti-Monopoly Act have been applied to more cases that involve international aspects.

In the past, the provisions of the Code of Civil Procedures on sending documents abroad were not applied *mutatis mutandis* and sending documents under the Anti-Monopoly Act to companies located overseas was not possible. Through amendments to the Anti-Monopoly Act in 2002, procedures are being put in place to send documents abroad[3].

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[2] In this case, the practice of setting a minimum sales price of cathode ray tubes which were purchased by the manufacturing subsidiaries in Southeast Asia (the real manufacturing base of cathode ray tube televisions) of a Japanese television manufacturing/distributing company, by cathode ray tube manufacturing/distributing companies of Japan, the Republic of Korea, and Chinese Taipei, etc. and their subsidiaries in Southeast Asia, etc. (the real manufacturing base of cathode ray tubes), was deemed to fall under the category of unreasonable trade restrictions.
Although both the sales of cathode ray tubes and the setting of the minimum sales price took place outside Japan (in Southeast Asia), (1) cathode ray tube manufacturing/distributing companies directly negotiated and determined trade conditions with a Japanese television manufacturing/distributing company based on the minimum sales price set as above, (2) subsidiaries of the cathode ray tube manufacturing/distributing companies in Southeast Asia were directed to sell cathode ray tubes at the price determined above, (3) the subsidiaries of the cathode ray tube manufacturing/distributing companies sold cathode ray tubes to subsidiaries of the Japanese television manufacturing/distributing company at the price directed above, and (4) the subsidiaries of the Japanese television manufacturing/distributing company sold most of the cathode ray tube televisions they manufactured to the Japanese television manufacturing/distributing company. Therefore, the practice was determined to have practically restricted competition in the Japanese market, and thus the Anti-Monopoly Act of Japan was considered to be applicable.
[3] In Japan’s past practice, in Nordion Case, for example the documents were sent to the representative lawyer of Nordion in Japan. Through amendments to the Anti-Monopoly Act in 2002, the provisions of the Code of Civil Procedures on sending documents abroad were applied *mutatis mutandis* and it became possible to make service by public notification in certain cases. Therefore it became possible to proceed with the procedures without problems regarding enforcement jurisdiction. The Japan Fair Trade Commission

2) The Limit of Applying Competition Laws Extraterritorially under the "Effects Doctrine" — the "Excessive" Extraterritorial Application of Competition Law (Antitrust Law)

The essential purpose of national competition laws is to protect the interests of consumers by ensuring that competition in the domestic markets is free and fair. Under the "effects doctrine" described above, competition laws can be applied extraterritorially only in cases where actions taken outside a country have a direct and substantial impact on competition in the domestic markets. Therefore, the attempt to extraterritorially apply competition laws to actions outside the country that do not have a direct and substantial impact on competition in the domestic market (for example, an import cartel in an importing country that harms exporters' interest in an exporting country) goes beyond the scope of the international consensus on the extraterritorial application of competition laws under the "effects doctrine." Rather than focusing on the exporters' interests, the exporting country should take issue with the actions under the competition law of the importing country, because such actions likely harm competition within the importing country.

However, since 1992 the United States has interpreted the effects doctrine broadly and announced guidelines that require the application of its competition laws and antitrust laws to actions outside its territory if the actions restrict U.S. exports. This policy was announced on the basis that such actions "have an effect on exporters within U.S. territory" regardless of whether they have a "substantive effect" on the domestic market.

Before the guideline was announced, support for the extraterritorial application was based on the "rule of reason." In 1982, the U.S. Congress established a law on extraterritorial application (legislative jurisdiction) called the Foreign Trade Antitrust Improvements Act (FTAIA). However, the Department of Justice 1988 Antitrust Guidelines for International Operations focused only on anti-competitive actions that could be presumed to harm the competition in the U.S. market. The Guidelines did not address

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sent the Report Order based on the Anti-Monopoly Act by service made as commissioned agent to counsel in the acquisition case of Rio Tinto by BHP Billiton in 2008. However, the Japan Fair Trade Commission made service by public notification in September 2008 and obtained a response in November 2008 because BHP Billiton had not accepted the Order. Subsequently the Japan Fair Trade Commission officially terminated the merger review of this case in December 2008 as a result of the announcement of the withdrawal of the Acquisition Plan by BHP Billiton late in November 2008. Furthermore, the Japanese Fair Trade Commission executed cease and desist orders and orders for payment of surcharge against manufacturing/distributing companies of cathode ray tubes for televisions (including foreign companies) in 2009 (see footnote 2). However, companies located in the Republic of Korea, Malaysia, and Indonesia did not have branches/business offices or representatives in Japan, and thus consular delivery by the Japanese consul residing in the foreign countries was attempted but failed. Therefore, in 2010, the written orders were sent by delivery of public notice.

the subject of anti-competitive conduct that restricted U.S. exports to enforcement actions.

In April 1992, however, the Department of Justice announced that it would begin enforcement of the U.S. antitrust laws extraterritorially with respect to foreign conduct restricting U.S. exports, regardless of whether the conduct harmed competition in the U.S. market. The new policy applies to anti-competitive conduct that could reasonably be expected to directly and substantially impact U.S. exports.

In May 1994, the Department of Justice initiated its first case under the 1992 policy change, alleging anti-trust violations by Pilkington Co. of the United Kingdom. The Department of Justice maintained that conditions in a patent licensing contract between Pilkington and U.S. companies, that defined territorial limitations and export restrictions and that banned sub-licensing, constituted an improper limitation of business when these conditions were still in effect (despite the fact that the contract itself was invalid). The Department of Justice determined that these restrictive clauses placed limits on glass exports by U.S. companies and glass production outside the United States. The case was settled out of court by the company and the Department of Justice; Pilkington was prohibited from exercising any right under any form of licensing agreement that would limit exports or production by U.S. companies.

In April 1995, the Department of Justice and the Federal Trade Commission published a revised version of the 1988 Antitrust Guidelines for International Operations. Following the 1992 policy change, the new guidelines expanded the jurisdiction of the Department of Justice and the Federal Trade Commission over actions that harm the interests of U.S. exporters and explicitly stated that the agencies will extraterritorially apply U.S. antitrust laws to actions that harm the interests of U.S. exporters[4].

Prior to the adoption of this new policy, no country had ever applied its competition laws extraterritorially by alleging that conduct in foreign countries restricting its exports adversely impacts its exporters. This new policy appears to go beyond the internationally recognized effects doctrine.

3) Substantive Constraints on the Extraterritorial Application of Competition Laws Due to the Limits of Enforcement Jurisdiction

As noted above, an international consensus is gradually emerging on the extraterritorial application of competition laws based on the "effects doctrine."

[4] In November 1997, the Department of Justice established an "International Competition Policy Advisory Committee (ICPAC)" to consider the issues arising from the extraterritorial application of competition law. The Committee submitted its final report to the Attorney General and the Assistant Attorney General for Antitrust in February 2000. The report argues that it is important to use "positive comity" to deal with market access problems that harm the interests of U.S. exporters; it also states that extraterritorial application should be maintained as a possible solution. (*See* Section 2 1) below "Expected Restraint of Extraterritorial Application Through International Cooperation".)

Competition authorities are expected to exercise restraint in the extraterritorial application of these laws in a direct manner with respect to companies located overseas (foreign companies).

As discussed above, there are two types of jurisdiction — legislative jurisdiction, which pertains to the establishment and application of laws, and enforcement jurisdiction, which pertains to their enforcement. The effects doctrine discussed earlier is grounded in legislative jurisdiction. Competition authorities' enforcement jurisdiction over foreign companies requires separate consideration. The direct exertion of enforcement jurisdiction on companies located overseas is assumed not only in the case of the extraterritorial application of competition laws (application to conduct occurring outside the country's territory) but also in the case of applying the laws on conduct by foreign companies occurring within the country's territory. The inviolability of sovereign rights is accepted internationally as a basic principle which prohibits one country from exercising its power in the territory of another country without the latter's official permission[5]. Where Country A applies its competition laws extraterritorially to a company in Country B without the consent of Country B's government, the institution of exclusionary measures or the imposition of fines or other compelling measures against that company within the territory of Country B is a violation of international law. Contacting the company in Country B as part of the procedures pertaining to these compelling measures could also be considered an excessive exercise of governmental authority in violation of the above-mentioned principle. The issue of enforcement jurisdiction has become particularly prominent in recent cases where competition authorities have directly made fact-finding requests to foreign companies in the context of competition law enforcement.

Competition authorities have employed a number of methods to avoid this problem. Where the competition authorities in one country wish to pursue investigations with respect to a company in another country, they can, for example, utilize the cooperation agreements described below to request the cooperation of the counterpart institution. Inquiries are also sometimes addressed to subsidiaries, branches or agencies of the company which have been established within their own territory (*see* footnote 3 on previous page). Another option is to ask a representative from the foreign company to come in to deal with the issue. However, the authority of subsidiaries and branches to represent their parent company interests is doubtful.

4) Recommended Actions

[5] The Judgment of the Permanent Court of International Justice in The Case of the S.S. Lotus in 1927, which was one of the well-known precedents related to the above, stated "the first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissible rule to the contrary, it may not exercise its power in any form in the territory of another State,.." Also, Robert Jennings and Arthur Watts, Oppenheim's International Law 9th ed. (1992), which was a representative learned treatise in this field, stated "a State is not allowed...to exercise an act of administration or jurisdiction on foreign territory, without permission."

The U.S. policy of extraterritorial application, as mentioned above, generally goes beyond the scope of the international consensus on the effects doctrine. If it does exceed the proper scope, it may constitute "excessive" extraterritorial application of competition law. "Excessive" extraterritorial application of competition law tends to bring about serious conflicts between the involved parties, rather than encouraging those parties to settle the disputes.

When the Department of Justice changed its policy in April 1992, Japan expressed regret and concern that this was exactly the type of extraterritorial application of U.S. domestic laws that is not justified under international law. Japan requested that the United States proceed with caution in applying its new policy. In the *Thermal Fax Paper Case*[6], the government of Japan also expressed, in *amicus curiae* briefs submitted to the Federal Circuit Court in November 1996 and to the U.S. Supreme Court in July 1997, the position that the Department of Justice's extraterritorial application of the criminal provisions of U.S. competition laws against conduct by foreign companies outside the U.S. is not valid under international law.

The Japanese Government further expressed its views on February 3, 2004, in an '*amicus curiae*' brief before the US Supreme Court in the *Vitamin Cartel Case*[7]. Japan

[6] Thermal Fax Paper Case
This was the first case arguing for extraterritorial application of the criminal provisions of U.S. competition laws. One of the Japanese paper companies which had raised the price of thermal fax paper exported to U.S. around 1990 was prosecuted by the US Department of Justice in December 1995 as conspiring in a cartel in Japan. In September 1996 the Massachusetts Federal District Court dismissed the complaint of the plaintiff (the US Department of Justice) because there was some doubt about applying extraterritorially under the effect doctrine in a criminal case. However, the Court of Appeals overturned the District Court decision because there was no reason to treat a civil case and a criminal case differently, and the U.S. Supreme Court also dismissed the appeal in January 1998. Therefore it was confirmed that the United States applied the US Antitrust Law extraterritorially in a criminal case.

[7] Vitamin Cartel Case
12 vitamin purchasers outside the United States (in Ecuador, Panama, Mexico, Belgium, the United Kingdom, Indonesia, Australia, Ukraine and so on) filed a class action on behalf of vitamin purchasers inside and outside the United States under the US Antitrust Law in November 2000 because of injury due to an international cartel by 46 vitamin manufactures including 6 Japanese entities, US entities and German entities.
This case was a treble damages suit regarding global market allotment and price agreement including the United States and an international cartel in a conspiracy by the defendants. Initially the US Federal District Court dismissed the action because there was no subject matter jurisdiction. However, the Federal Court of Appeals quashed the decision of the District Court based on its interpretation of The Foreign Trade Antitrust Improvements Act (FTAIA) and granted the subject matter jurisdiction of the US Federal District Court. After that, the defendant appealed to the U.S. Supreme Court and the Court accepted the appeal in December 2003. In June 2004 the Supreme Court ruled that the US Antitrust

argued in its Statement of Position that the Foreign Trade Antitrust Improvements Act (FTAIA) or an extraterritorial application of the Sherman Act should not be construed so as to allow buyers outside the US territory, who purchase products from a foreign company outside the US territory, to file a lawsuit seeking damages under the US Antitrust Law. Similar statements were submitted by the governments of Canada, UK, Germany, the Netherlands, and Belgium.

Again in 2003, four companies outside the US territory—in Venezuela, the Philippines, Taiwan and Germany—lodged a suit based on anti-trust laws against ten manufacturers of chemical seasoning including a Japanese company for losses concerning chemical seasoning caused by an international cartel[8]. In this case, the Japanese government submitted an opinion statement to the federal court of appeals, arguing the same points as in the *Vitamin Cartel Case*.

It is important to insist actively and continuously that countries refrain from unilateral and "excessive" extraterritorial application of their competition laws and to

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Law (Sherman Act) did not apply to injury caused outside the United States, on the grounds that injury caused due to conspiracy of defendants in cartel activity outside the United States was independent of injury due to the same cartel activity inside the United States; it should be noted that the case related to injury caused only outside the United States. The Court did not rule on the claim of the plaintiff that the effect caused due to the cartel activity outside the United States was related to the effect inside the United States, because the claim was not examined and ruled in the appeal, and it remanded this issue to the Federal Court of Appeals. In June 2005, the Court of Appeals ruled that injury caused due to cartel activity outside the United States was independent of injury inside the United States, and subject matter jurisdiction was not granted. In October 2005, the plaintiff filed a petition for acceptance of final appeal with the Federal Court of Appeals. However, in January 2006, the U.S. Supreme Court ruled that the judgment of the Federal Court of Appeals was appropriate and dismissed the petition of the plaintiff for acceptance of final appeal. Therefore, the judgment of the Federal Court of Appeals was confirmed, which meant that subject matter jurisdiction of the US Federal District Court was not granted.
In June 2004, the judgment of the U.S. Supreme Court stated that foreign governments were concerned that it was an infringement of national sovereignty to apply treble damages of the US Antitrust Law to acts in the foreign countries with quoting the amicus curiae submitted by Germany, Canada and Japan.

[8] Chemical Seasoning Cartel Case
In this case subject matter jurisdiction of the US Federal District Court was also argued, as in the Vitamin Cartel Case above. In May 2005, Minnesota Federal District Court said that the US domestic courts had jurisdiction. However, the Court overturned its initial judgment and denied jurisdiction in October 2005. (In June 2005, jurisdiction was denied in the remanded Vitamin Cartel Case.). The plaintiff appealed the decision to the 8th Circuit Court of Appeals. In February 2006, the Court of Appeals dismissed the claim of the plaintiff regarding subject matter jurisdiction because there was not a direct relationship between injury outside the United States and injury inside the United States caused by the cartel

promote bilateral or multilateral co-operation in order to prevent the violation of such laws.

Countries such as the United Kingdom and Australia have even enacted blocking statutes that refuse to approve or implement decisions by foreign courts in response to extraterritorial application by the United States. These blocking statutes also forbid private firms from obeying an order for submitting information and other actions issued by a foreign government or court.

5) New Developments of the Effects Doctrine in the United States

In the United States, as found in the decisions in the *Alcoa Case* by the Federal Circuit Court and the *Hartford Fire Insurance Company Case* by the Supreme Court, a principle has been established that the US Sherman Antitrust Act should be applied to intentional acts that have had substantial impact on the domestic market in the United States, even if such act occurred outside the United States. Further, according to FTAIA, the US Sherman Antitrust Act should be applied to conduct violating the Sherman Act which could reasonably be expected to directly and substantially harm not only imports but also the internal trade and import transactions within the United States. Conduct violating the Sherman Act regarding export transaction which could reasonably be expected to directly and substantially harm US exporters also violated the Sherman Act. Since 2010 parts production bases, assembling factories and sales offices for end products have been located anywhere around the world and, in addition, economic globalization, and price interlocking in different regions (mainly relating to commodities) has been escalating.

A remarkable development in the effects doctrine has been observed mainly in the court cases in the United States. In the *Potash International Cartel Case*, the purchaser of potash (potassium or kalium used in agricultural fertilizer) in the United States brought a class action for damages against the world's major Potash manufacturers in Canada, Russia and Belarus for engaging in an international cartel to adjust the production volume of Potash, thereby causing the price to rise in the United States market. The plaintiff insisted that the price of potash in the United States market went up because of the increase in the price of potash in China, Brazil and India, which had been controlled by the defendant potash manufacturers' cartel and eventually functioned as a price benchmark. However, the defendants argued that in case a cartel existed as the plaintiff insisted, the target markets had solely been China, Brazil and India, and such act did not directly harm the United States market. Thus the defendant counter-argued that the case was not entitled to exemption under FTAIA, nor within the limitation of application of the US Sherman Antitrust Act. In June 2012, the judicial decision by the seventh US Circuit Court of Appeals *en banc* stated that the FTAIA requirement of "directly" should have been interpreted as "reasonably proximate" in this case because when the act taken abroad only effects import transactions or internal trade in the United States remotely, then such act should be excluded from the limitation of application of the US Anti-Trust Law (this theory adopted the interpretation in the *amici curiae* submitted to the court by the United States Department of Justice and the Federal Trade Commission). Based on this reasoning, supposing the plaintiff's case as true, the defendants should have adopted the market price of potash in Brazil, India and China as the benchmark to determine its price in the United States market. In fact, right after the price rose in the markets of Brazil, India and China, the price rise was witnessed in the United States market. Therefore, the activities of defendants' cartel were determined as "reasonably proximate" with importing business to the United States or US domestic commerce. Further emphasized was that the competition law of the importing country should be applied to the natural resources cartel because there is no incentive to control cartel activities in the exporting country of the natural resources while the affected will be the consumers in the importing countries.

Also, in the *TFT-LCD International Cartel Case*, the distributers and consumers of products equipped with LCD panels such as TVs and laptops in the United States brought a class action for damages against the LCD panel manufacturers of the Republic of Korea, Japan and Taiwan for engaging in an international cartel to control the price of the LCD panels. The defendant LCD panel manufacturers argued that most of their LCD panels are first sold to foreign enterprises outside the United States, then those foreign enterprises assemble such LCD panels into end products such as TVs and laptops, and the end products assembled there were imported to the United States. Therefore, the defendants claimed their conduct did not harm the market of the United States directly, and should not be applicable to the US harm exemption under FTAIA, nor within the scope of application of the US Sherman Antitrust Act. In this regard, the California District Court decision of October 2011 stated that if the interpretation of the word "directly" of the FTAIA is limited to direct sale, there is the disadvantage of not being able to crack down on anti-competitive conduct which causes huge damage to the consumers in the United States. Further, based on the fact that the LCD panel is the major component of the electrical products such as TVs and laptops (the end products) and the defendants were suspected of using the price of those end products in the United States as the index price of the LCD panel cartel, the rise in price of TV, monitors and laptops were determined to be caused without any obstacles by the rise in price of LCD panel by the cartel. Thus, the defendants' cartel was not considered to be beyond the limitation of the US Sherman Antitrust Act because it "directly" caused damage to the market in the United States[9]. However, in January 2014, in the case brought, not by users in the United States, but by manufacturers of products equipped with LCD panels for damages, an Illinois district court ruled that both (1) LCD

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[9] Regarding the TFT-LCD International Cartel Case, the European Commission imposed a limitation on the scope of the sales of LCD panels, which would be the basis for calculating the fine as follows: (1) sales of LCD panel sold to a third party within EEA by the cartel-driven group companies; and (2) sales of TVs and IT products sold to the third party within EEA by the cartel-driven group companies after such products were equipped with the LCD panel within the cartel-driven group companies. Taking into account that the international scope of application of the competition laws and the scope of sales as a basis for calculating fines are considered closely related, this EU Commission approach was considered rather moderate as compared to that of the United States. (http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3580_3.pdf. See Note 384)

panels purchased by subsidiaries of the plaintiff located outside the United States and equipped with the products outside the United States and the final products of which were sold in the United States were not within the limitation of application of the US Sherman Antitrust Act, nor were (2) LCD panels purchased by subsidiaries of the plaintiff located outside the United States and equipped with the products outside the United States and the final products of which were sold outside the United States[10].

Thus, the *Potash International Cartel Case* indicated that a cartel which targeted a market outside the United States could be subjected to the US Sherman Antitrust Act when the effects of a rise in price led by such cartel had an impact on the United States market. Also, the California district court decision on the *TFT-LCD International Cartel Case* indicated that a cartel on the product parts which would be distributed to the United States indirectly through commodity distribution and commercial distribution could be subject to the US Sherman Antitrust Act. However, in the case brought, not by retail stores or final users in the United States, but by manufacturers of products equipped with LCD panels, the Illinois district court ruled that even if the final products were sold in the United States, LCD panels purchased by the manufacturers outside the United States were not within the limitation of application of the US Sherman Antitrust Act. Furthermore, in November 2014, the US Court of Appeals for the Seventh Circuit supported the conclusion of the district court. Whether the plaintiff suffered injury in the United States or outside the United States may have been a decisive borderline between the decisions of the California district court and of the Illinois district court and its appeal court. In any event, attention needs to be paid to future developments of this issue, including deliberations at the Supreme Court of the United States, etc. Although these court decisions in the United States are solely case-by-case, extra attention should be paid to the fact that there had been various opinions concerning the extraterritorial application of the US Sherman Antitrust Act. Particularly, the judicial decision in the seventh US Circuit Appeal *en banc* considered it appropriate to interpret the key word “directly” under the FTAIA as “reasonably proximate” for the *Potash International Cartel Case*. However careful review is necessary to ensure consistency of “directly” under effects doctrine from the perspective indicated by the International Law Association.

On the other hand, the judicial decision emphasized the legitimacy of handling the cartel of natural resources with the competition laws of the importing country. However, Japan as an importing country of natural resources should pay attention that the same request could be placed upon itself. The Japan Fair Trade Commission made the following two cases subject to corporate merger review from the perspective of the effects doctrine and subjected them to strict examination: the *acquisition case of Rio Tinto* (2008) by BHP Billiton, the world’s biggest producer and distributor of ironstone and coal, and the *foundation case* of ironstone producing joint-venture by those two companies (2010).

[10] The Ministry of Economy, Trade and Industry submitted an *amicus curiae* brief to the Court requesting a measured judgment not to accept excessively broad extraterritorial application, referring to the *amicus curiae* of the Japanese government in the Empagran case.

2. Expected Restraint of Extraterritorial Application through International Cooperation

1) "International Comity" and Extraterritorial Application

"International comity" is the idea that courts of one country should, in consideration of international relations, treat the decisions of foreign governments with a degree of respect and deference. Comity requires that courts restrain their judgment in certain cases even though they may technically have jurisdiction, a concept also referred to as "negative comity." This common law notion was traditionally used to prevent international disputes from arising through a conflict of jurisdiction caused by the extraterritorial application of domestic laws.

Irrespective of the recognition of the international comity principle in various treaties and in the mutual assistance provisions within these treaties, international law imposes no obligation with regard to either positive or negative comity, both of which remain a matter of national policy. Unless a specific bilateral agreement has been reached in this regard, violators of the international comity principle can only be criticized on moral and political grounds, with no legal liability.

2) Transition of "International Comity" in the United States

During the 1970s in the United States, the *Timberlane Case*[11] raised questions on the "effects doctrine" which affirmed the extraterritorial application of laws whenever the "effect" arises from the activity in question. The Federal Circuit Court held that, when exercising jurisdiction, "international comity" must be taken into full consideration.

However, in the 1993 *Hartford Fire Case*[12], the U.S. Supreme Court confirmed that

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[11] Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).
In deciding whether to exercise jurisdiction, the court held that a restrictive position should be applied with respect to the extraterritorial application of antitrust laws based on the "jurisdictional rule of reason" and in consideration of international comity. Specifically, the following factors should be considered: (1) the degree of conflict with foreign law or policy; (2) the nationality or allegiance of the parties and the location of the principal places of business of corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the United States as compared with those elsewhere; (5) the extent to which there is explicit intent to harm or affect U.S. commerce; (6) the foreseeability of such affect; and (7) the relative importance of the violations charged to the conduct within the United States as compared with conduct abroad.

[12] Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993).
This antitrust case, involving a British insurance company, narrowed the interpretation of international comity and indicated approval for wide extraterritorial application of

the "effects doctrine" controls extraterritorial application of antitrust laws. It further concluded that international comity should not restrain the exercise of jurisdiction except in cases where: (1) a foreign law mandates conduct that a U.S. state law forbids, or (2) the observance of the U.S. law violates foreign law.

Moreover, in April 1995, the U.S. Department of Justice and the Federal Trade Commission published a revised version of the 1988 Antitrust Guidelines for International Operations. These guidelines specify that "international comity" must be considered in the extraterritorial application of antitrust laws. The guidelines stated that the extraterritorial application of U.S. antitrust law must strike a balance between the necessity of exercising such antitrust laws and foreign policy considerations. However, since the guidelines cite the narrow interpretation of international comity as seen in the *Hartford Fire Case*, we fear that "international comity" cannot effectively prevent extraterritorial application of U.S. antitrust laws.

In 2004, the US Federal Supreme Court rejected extraterritorial application of the US Antitrust Law in the *Vitamin Cartel Case* and agreed with views expressed by potentially affected countries, including Japan, that doing otherwise would constitute a practical infringement of the right of each country to execute its competition laws. However, citing the *Hartford Fire Insurance Company Case*, the Supreme Court found that this limitation was not applicable to damages caused within the US territory. Japan remains concerned that 'international comity' may not be an effective deterrent against the extraterritorial application of the US Antitrust Laws.

3) Trends Toward International Harmonization

To solve the problem of duplication or conflicting jurisdiction caused by extraterritorial application of competition law, an international treaty or agreement may be useful. Committing to such a treaty or agreement, however, is difficult since competition laws have not yet been harmonized. Therefore, it is important to harmonize them in conjunction with international cooperation on enforcing competition laws.

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domestic laws. This may encourage more active prosecution of actions outside the territory of the United States and may lead to abuses. The background of this case is as follows: in 1988, several U.S. states, together with a large number of private citizens, brought suit against British insurance companies and the U.S. government for agreeing to limits on reinsurance terms. The states claimed that the limitations violated the Sherman Act. The British defendants argued that this was an action by non-U.S. parties entirely outside the territory of the United States in a place where the action was legal, citing the fact that this was a long-established practice in the British reinsurance market. Therefore, they moved to dismiss the case because the Sherman Act did not apply. In 1993, however, the U.S. Supreme Court indicated that U.S. courts should not refuse to exercise extraterritorial jurisdiction for reasons of international comity, so long as foreign laws did not order foreign nationals to engage in conduct prohibited under U.S. antitrust laws or so long as obedience to U.S. laws would not be illegal under foreign laws.

The *Gas Insulated Switchgear (GIS)*[13] case, in which ten companies including five Japanese companies, were ordered to pay fines in 2007, highlights the institutional differences of international competition laws. It was agreed that the Japanese companies had not entered the EU market. However, because the EU Competition Law allows fines of up to 10% of the total sales of the violator's business in the year immediately before the violation, the Japanese companies were ordered to pay massive fines even though they recorded no sales in the EU market. On the other hand, under Japan's Anti-Monopoly Act, the amount of the surcharge (fines) a cartel company is subject to is calculated by multiplying a certain ratio by the "sales amount in relation to the cartel in question." Therefore, in Japan no surcharge is ordered with respect to companies that did not have such sales. Thus, even if the violation is of the same sort, there will be significant differences in the actual amounts of fines due to significant differences in the calculation method of fines (surcharges) between the legal systems of the regulatory countries.

(a) International Cooperation on the Enforcement of Competition Laws

Since the 1970s, multilateral and bilateral instruments for cooperation in notification and information regarding competition law enforcement have been created. Among the multilateral instruments, the "OECD Council Recommendation Concerning Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade" (formed in 1979 and revised in 1995) specifies the utilization of a notification and consultation system. This was followed in March 1998 by the "OECD Council Recommendation concerning Effective Action Against 'Hard Core' Cartels," which advances convergence of national laws prohibiting hard core cartels as a particularly egregious violation of competition law and stipulates international cooperation and comity with regard to enforcement. In October 2005 "Recommendation of the Council on Merger Review 2005", which provided coordination and cooperation on international merger review among competition authorities, was adopted.

More than ten bilateral cooperation agreements have been concluded, including: U.S.-Germany (1976), U.S.-Australia (1982, amended in 1999), U.S.-Canada (concluded in 1984, revised in 1995, amended in 2004), Germany-France (concluded in 1984), U.S.-EU (concluded in 1991, amended in 1998), Australia-New Zealand (1994, revised in 2007), U.S.-Israel (1999), EU-Canada (1999), U.S.-Brazil (1999), U.S.-Mexico (2000), Canada-Australia-New Zealand (2000), and Canada-Mexico (2001). Among these agreements, the U.S.-EU agreement provides for a positive comity process where, if one

[13] Gas Insulated Switchgear (GIS) Cartel Case
In January 2007, the European Commission ordered 11 companies, including Japanese companies, to pay fines totaling approximately 750 million Euros for participating in an international cartel (one company received immunity under the leniency system) in the Gas Insulated Switchgear (GIS) market. The Japanese companies fined in this case delivered little of the product in question to the EU market during the period of the cartel (1988 to 2004). However, the European Commission pointed out that their agreement to abstain from bidding distorted market competition. All Japanese companies fined are filing complaints with the European Court of Justice.

country requests the other to enforce competition laws and the other country begins enforcement, it is possible for the requesting country to reserve or interrupt its own enforcement of such laws. These agreements are all intended to provide a framework for preventing clashes caused by extraterritorial application of competition laws and to foster cooperation in dealing with anti-trust activities occurring beyond a country's borders[14]. Furthermore, the "OECD Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings"[15] was adopted in September 2014. This Recommendation promotes free information exchange among competition authorities, and further advances cooperation between competition authorities of the member countries by prompting them to achieve consistency between the leniency/amnesty systems. This OECD Recommendation affects the cooperation between competition authorities of the member countries, and, hopefully, the establishment and revision of bilateral agreements in the future. The cooperation agreement between the EU and Switzerland[16], which entered into force in December 2014, provides for the handling of confidential information between competition authorities in conformity with this Recommendation[17].

Influenced by these developments in global cooperation, Japan and the United States signed an agreement concerning cooperation on "anti-competitive activities" in October 1999. This agreement is designed to: (1) strengthen the enforcement of

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[14] Examples of cooperation among completion authorities --
The United States and the EU have established a working group to strengthen their cooperation in regard to merger issues and have pursued close cooperation based on the exchange of information from the initial stage of investigations. In addition to mergers, the Microsoft Case also was resolved based on the U.S./EU cooperation agreement framework. The U.S. Department of Justice and the European Commission worked together in investigating both markets with respect to Microsoft's alleged abuse of its dominant position, as seen in contracting licensing agreements, and reached a consensual agreement in July 1994 concerning the eradication of exclusive trading practices. This case demonstrates the commitment of both authorities to actively address anti-competitive practices by multinational enterprises.
An investigation of discriminatory treatment related to the computerized airline booking system was the first example of an investigation implemented based on the "positive comity" of the cooperation agreement framework. In this case, the Department of Justice asked the European Commission for an investigation following a complaint filed by American Airlines. The European Commission reacted by starting an official investigation of Air France, which triggered a dialogue between the parties (Air France and SABRE, the computer booking system of American Airlines) to reach an agreement on remedial measures, resulting in the solution of the problem in 2000.

[15] 2014 OECD Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings

[16] AGREEMENT between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, OJ L 347/4 (3.12.2014) (EU-Switzerland Cooperation Agreement)

[17] Articles 7-9 of the EU-Switzerland Cooperation Agreement

competition laws against anti-competitive activities with international aspects; (2) develop cooperation between Japan and U.S. antitrust authorities; and (3) deal with the problems of extraterritorial application of U.S. antitrust laws. Japan signed a similar agreement with EU in August 2003 and with Canada in October 2005.

Within the framework of regional economic partnerships, measures have been taken aimed at cooperation in the area of competition policy. Specific agreements formed include the "Japan-Singapore Agreement for a New-Age Economic Partnership" (effective in November 2002), the Japan-Mexico EPA (effective in April 2005), the Japan-Malaysia EPA (effective in July 2006), the Japan-Chile EPA (effective in September 2007), the Japan-Thailand EPA (effective in November 2007), Japan-Indonesia EPA (effective in July 2008), the Japan-Philippines EPA (effective in December 2008), the Japan-Switzerland EPA (effective in September 2009), Japan-Viet Nam EPA (effective in October 2009), the Japan-India EPA (effective in August 2011), the Japan-Peru EPA (effective in March 2012), and the Japan-Australia EPA (effective in July 2014), all of which include bilateral cooperation concerning competition policy , although the level of cooperation varies.

Where anti-competitive conducts are punishable under criminal law, countries have recently begun to make use of Mutual Legal Assistance Treaties in Criminal Matters (MLATs) and other mutual assistance procedures for international investigations to engage the cooperation of other countries in acquiring the necessary proof for domestic criminal prosecutions. Where cooperation agreements on competition laws are used to provide the necessary information for achieving administrative ends, international investigation assistance focuses on the provision of proof in criminal cases. Japan and the U.S. concluded a MLAT in August 2003. Previously, pursuant to the Law for International Assistance in Investigation, Japan provided the United States government with investigative cooperation under certain conditions in response to a U.S. request for assistance (*e.g.*, in the *Thermal Fax Paper Cartel Case*, noted above, the Tokyo District Public Prosecutor's Office undertook an investigation in response to a request for assistance from the U.S. Government[18], and international cooperation such as information

[18] Mutual assistance for investigation in the Thermal Fax Paper Cartel Case --
At the trial stage of the Thermal Fax Paper Case (see supra, note 4 above), the Japanese government argued that the exercise of criminal jurisdiction under U.S. domestic laws in regard to actions taken by Japanese companies outside U.S. territory was not valid under international law. Nevertheless, at an earlier stage in the case, the Japanese government complied with a request from the U.S. for assistance, with the Tokyo District Public Prosecutor's Office engaging in search and seizure procedures. The Law for International Assistance in Investigation provides certain procedures for determining whether to accept a cooperation request. The only requirements indicated for rejecting such a request are a lack of dual criminality or the absence of a guarantee of reciprocity. As neither of these conditions pertained to the case in question, the Japanese government saw no reason to turn down the U.S. request. In the case of the former condition, theoretical dual criminality is considered to be adequate, and given that the cartel actions addressed by this case are also a criminal offense under Japan's Anti-Monopoly Law and Criminal Code, the Japanese government appears to have determined that such theoretical dual criminality existed.

exchange as necessary was exchanged among competition authorities of Japan and other countries[19].

(b) Competition Law Harmonization

As for harmonizing competition law, it may be useful to conduct multilateral discussions at the OECD, WTO and other fora to consider the convergence of competition laws. It would also be useful to introduce, through technological assistance, appropriate competition laws in the countries that have yet to establish competition policies. Furthermore, since July 1997, the WTO Working Group on the Interaction between Trade and Competition Policy discussed the impact of trade measures on competition and other issues. At the Fourth Ministerial Conference held in November 2001, Members agreed to begin preparatory work toward launching negotiations after the Fifth Ministerial Conference on establishing a framework for competition policy. Subsequently, the Working Group focused on the clarification of core principles, including transparency, non-discrimination and procedural fairness, as well as on provisions governing hard core cartels, modalities for voluntary cooperation, and support for progressive reinforcement of competition institutions in developing countries through capacity building. At the Fifth Ministerial Conference held in September 2003, Members did not reach agreement on commencing negotiations on reaching a framework, partly due to opposition from developing countries including new fields in the negotiations. Subsequently, in the framework agreement of July 2004, four new areas of negotiation were specified, namely, trade facilitation, investment, competition and transparency of government procurement. It was decided that, in the current Round preparatory work toward launching negotiations

[19] Information exchange among competition authorities of Japan and other countries -- The Japan Fair Trade Commission started the investigation around the same time as the US Department of Justice and the European Commission and exchanged information with them as necessary in the Bid-riggings Case by Marine Hose Manufacturers (the investigation started in Japan in May 2007), the Price fixing Case by Manufacturers of Cathode Ray Tubes for Televisions (the investigation started in Japan in November 2007) and the Bid-riggings Case by Manufacturers of Automotive Wire Harness and Related Products (the investigation starts in Japan in February 2011). Regarding merger cases, the Japan Fair Trade Commission exchanged information as needed with the US Federal Trade Commission and the European Commission in Acquisition of the Stock of SANYO Electric Co., Ltd. by Panasonic Corporation (in 2009), with the US Federal Trade Commission in Acquisition of Shares of Varian, Inc. by Agilent Technologies, Inc. (in 2010), with the Australian Competition and Consumer Commission, the European Commission, the German Federal Cartel Office and the Korea Fair Trade Commission in the Proposed Joint Venture for Iron Ore Production between BHP Billiton and Rio Tinto (in 2010) , with the US Department of Justice and the Korea Fair Trade Commission, etc. in acquisition of shares of Cymer Inc. by ASML US Inc. (in 2013), and with the US Federal Trade Commission and the European Commission in between Thermo Fisher Scientific Inc. and Life Technologies Corporation (in 2014).

would be carried out only concerning trade facilitation.

In October 2001, competition authorities from the United States, the EU and several developed countries launched the International Competition Network (ICN) to seek consensus on proposals for procedural and substantive convergence in antitrust enforcement. Because this is a voluntary organization, even where consensus is reached the implementation thereof is left to the discretion of individual members. Now that the occasions for authorities to apply their competition laws under multiple jurisdictions are on the rise, the ICN should prove a useful arena for broad discussion among related personnel and a means for addressing the issues in terms of their procedural and substantive aspects. As of the end of December 2013, 129 competitive authorities from 114 countries/regions participated in the Network, continuing deliberations at workshops such as the Workshop on Cartel and the Workshop on Mergers.

In Japan, revisions were made to the Anti-Monopoly Act in consideration of international harmonization. Specifically, the Anti-Monopoly Act was revised in 2005 to raise the calculated rate of fines for cartel companies from 6% to 10%. This remains low compared to other countries including the U.S. and EU. The revisions also introduced the leniency system resulting in a positive effect on the detection of cartels in the U.S. and EU. Moreover, the Anti-Monopoly Act was revised in 2009 and the maximum jail term against natural person for unreasonable restraint of trade (cartel), which was short compared with foreign countries' antitrust penalties, was increased from 3 years to 5 years; and regarding merger review, the prior notification system for share acquisitions was introduced along with changing the ex post reporting system and thresholds for notification, which was revised from the basis of the total of the assets of an acquiring corporation to the basis of the total of domestic turnover of a "corporate group." Furthermore, in December 2013, there was a procedural revision to secure appropriate procedures. The appeal system of the Fair Trade Commission was abolished and appeals against administrative actions such as cease and desist orders, etc. by the Commission were authorized to be filed directly to the courts. It is expected that further progress will be made in the systemic revision, taking into consideration the international harmonization of competition laws.

3. DISCIPLINE AGAINST THE ARBITRARY OR DISCRIMINATORY APPLICATION OF COMPETITION LAWS

(1) Problems relating to the arbitrary or discriminatory application of competition laws

After competition laws were first introduced in the U.S. in the 1890s, the number of countries introducing them was limited. With the spread of liberal market economies, however, particularly from the 1990s onwards, many developing countries also started to introduce such laws. At present, over 100 countries and regions have competition laws in place, with a marked increase in their introduction in Asian countries since 2000 (coming into force in Indonesia in 2000, Papua New Guinea in 2002, Laos in 2004, Viet Nam in 2005, gradually in Singapore beginning in 2005 and the People's Republic of China in 2008, etc.). Hong Kong and Malaysia are also planning to introduce measures.

The background to developing countries introducing competition laws is thought to lie in the fact that many countries have recently succeeded in introducing a market economy mechanism. The successes of these countries are thought to have contributed to the spreading acknowledgement that market competition is an effective way of strengthening corporate and industrial competitiveness. The increasing sense of anticipation within international society regarding the introduction of competition laws by developing countries is perhaps a further contributory factor.

At the same time, there are also some countries where, while they seem to aim at fair judgments in the name of competition policy, the actual application of competition laws leads to fears that decisions are being made with the intention of protecting domestic industry. Considerations must be made carefully when deciding whether or not criticism is to be applied in individual cases, but in particular, in cases of corporate merger examinations and intervention in licensing contracts relating to intellectual property in developing countries, there is some concern that measures stated to be based on competition law perspectives may in fact have been executed to protect domestic industry.

Competition laws in various countries are designed and operated based on assumptions relating to countries' individual economic structures and market practices, and this Report is not designed to point critically at individual differences in terms of unfair practice. From the rule-oriented perspective, however, it is necessary to look carefully at whether measures that have been implemented in the name of competition policy are in fact protecting domestic industry, infringing on the WTO Agreement and/or other international rules. The aim of this Report is to clarify the framework for the relevant considerations.

(2) Outline of legal disciplines

1) Framework for considerations

This Report considered the problems related to extraterritorial jurisdiction of enacting and applying competition laws. International rules applied to competition laws are, however, not confined to the jurisdictional issue of the state. Competition laws are regulated by provisions of the WTO Agreement, Economic Partnership Agreements and Investment Protection Agreements applied to domestic policy in general as one type of legal restriction, which can have an impact on the export and import of goods and services, as well as on investment. Provisions that can be applied to competition laws include the national treatment obligation for non-discrimination between foreigners and locals, and the most-favoured-nation obligation for non-discrimination between foreigners, as well as the fair and equitable treatment obligation and GATT Article X, which requires transparency in domestic policy measures. In this section, therefore, the authors mainly consider domestic obligations relating to national treatment, in light of current concerns regarding whether or not they are being used to protect domestic industry in the country in question.

As described in the analysis below, the relationships between competition laws and the GATS/TRIPS (licensing regulations) Agreements, as well as investment agreements, are particularly important. However, considering that basic philosophies relating to national treatment are clarified in more detail in GATT precedents, GATT issues are discussed at first below.

2) WTO Agreement

The GATT, GATS and TRIPS Agreements included in the WTO Agreement set forth the national treatment and most-favoured-nation treatment requirements from the perspectives of liberalizing trade in goods, liberalizing trade in services, and protecting intellectual property rights respectively. The various regulations are applied cumulatively, and as such Members' competition laws are required to be consistent with all of the above requirements.

i) GATT

GATT includes regulations relating to national treatment in Article III. Article III:4 prohibits discrimination against imports compared to like products of national origin in respect of laws, regulations and requirements affecting the sale, etc., of such products. According to precedent, this does not apply merely to legal discrimination that defines different treatment of products depending on their country of origin. The national treatment obligation also may be infringed in cases where formal structures do not distinguish products by country of origin, but *de facto* discrimination is, regardless, in place. The precedent case of Chile – Tax on Alcoholic Beverages shows that there is ground for infringement of the national treatment obligation when different treatment between imported and domestic products that competed with one another in the market cause significant disadvantages to imports, and where the objective construct of these measures (for example, the criteria for categorizing products) is irrational in the light of policy objectives. The General Exceptions provided in GATT Article XX allow such measures as listed in the article to be counted as outside the application of the GATT, but do not include measures taken to promote competitive policy objectives; such measures are infringements of national treatment that cannot be justified.

For example, when considering the merger of overseas manufacturers exporting a product to a particular country, if the country in question attaches a seemingly irrational condition to the merger from the perspective of competition policy (such as the imposition of a limit on the volume of products the company may export to the country in question or a limit on manufacturing volume or future facilities investment, which equates in practice with a limit on the volume of such exports) as a condition for approving the merger, with the objective of protecting domestically manufactured products, it is likely that such measures will be found to constitute an infringement of national treatment under the terms of GATT. They may also be quantitative restriction measures, which are also prohibited by GATT.

If the merger in question does not demonstrate sufficient relevance for the country to exercise its jurisdiction, then the imposition of conditions in regard to the merger itself may be considered an excessive exercise of the country's jurisdiction, which is a problem in itself. This problem is discussed within the body of this Report.

ii) GATS

GATS defines the national treatment obligation in Article XVII. It differs from the most-favoured-nation treatment obligation in GATS in that it is not applied to all service sectors. Rather, Members bear the responsibility for the national treatment obligation in regard to the service sectors agreed by themselves, according to the conditions and limits contained in their schedules of concessions (the "positive list method"). In regard to these sectors, Members may not impose less favorable measures in regard to foreign services or service suppliers. In such cases, regardless of whether treatment provided is formally identical or different, if conditions of competition are in favor of domestic services or service suppliers compared to like services or service suppliers of any other countries, it is an infringement of the national treatment obligation (Article XVII:3). If overseas corporations, or corporations funded by foreign capital, are treated less favorably than domestic companies, this constitutes an infringement of the national treatment obligation.

iii) TRIPS

The TRIPS Agreement provides the national treatment obligation in Article 3.1. According to the definition therein, "protection of intellectual property" shall "include […] those matters affecting the use of intellectual property rights specifically addressed in this Agreement." Article 21 provides that Members "may determine conditions on the licensing […] of trademarks," and Article 28.2 provides that patent owners shall have "the right […] to conclude licensing contracts." In accordance with these provisions, regulations under competition law applicable to licensing contracts for trademark rights or patent rights are subject to the national treatment obligation under the TRIPS Agreement.

For instance, if a Member imposes restrictions only on licensing contracts in which the licensor is a foreign business and the licensee is a domestic business, while exempting licensing contracts between domestic businesses from restrictions, this would be suspected of being inconsistent with the national treatment obligation under the TRIPS Agreement. In Japan, the former Antimonopoly Act required notification to be made only with regard to licensing contracts between domestic businesses and foreign businesses; this requirement of notification has been abolished under the existing law.

There is a precedential dispute decision in which a WTO Panel referred to the view that "nationality" is the basis for determining whether a person is a Member's "own national" in the context of the national treatment obligation under the TRIPS Agreement; with respect to legal persons of private status such as companies, their nationality can be determined in accordance with criteria such as the law of the place of incorporation or the law of the seat of the company (Panel Report on European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (hereinafter referred to as the "EC Geographical Indications Case")) in which the Panel stated that within the European Communities, the law of the place of incorporation can be used to determine the nationality of legal persons. According to the Panel's ruling, imposing additional regulations on licensing depending on criteria such as the nationality of the trademark or patent owner, (that is, the licensor, or in the case of a legal person, as determined under the place of the law of incorporation or the law of its company seat), constitutes *de jure* discrimination, and therefore violates the national treatment obligation. Further, according to precedents in past WTO disputes, the national treatment obligation under Article 3 of the TRIPS Agreement could be violated, unlike that under Article 2(1) of the Paris Convention, even where formally identical protection is accorded to both nationals and non-nationals. In the EC Geographical Indications Case, one of the measures stated that when applying for a registration in the territory of the European Communities with regard to a geographic indication (GI) located in a third country outside that territory, the applicant is subject to conditions that do not need to be satisfied for a registration of a GI located within the European Communities, e.g. obtaining approval of the government of said third country. The question was whether such a measure was consistent with the TRIPS Agreement. It could be said that this measure does not formally discriminate according to nationality, since every person who wishes to register a non-EC GI must satisfy those conditions, irrespective of nationality. Also, in reality, users of non-EC GIs are not limited to non-EC nationals, and, vice versa, users of EC GIs are not limited to EC nationals. However, the Panel held that *de facto* discrimination would be in violation of the national treatment obligation under Article 3 of the TRIPS Agreement, as is the case of that under GATT Article III, and found that between EC nationals and non-EC nationals who wish to register non-EC GIs, less favorable treatment is accorded to the latter, on the grounds that the vast majority of users of those non-EC GIs would be non-EC nationals. In conclusion, while rejecting the claim of violation of the national treatment obligation under Article 2(1) of the Paris Convention, the Panel concluded that the measures at issue violated the national treatment obligation under Article 3 of the TRIPS Agreement.

In accordance with this ruling, there would be the possibility that measures such as requiring notification only with regard to contracts for licensing from overseas, or imposing additional regulations that could restrict rights of overseas licensors, may be regarded as *de facto* discrimination, and be claimed as being inconsistent with the national treatment obligation under the TRIPS Agreement. This is because even if those measures do not target only foreign nationals or foreign legal persons, it is assumed that most overseas licensors would be legal persons incorporated in foreign countries or having their company headquarters in foreign countries.

Members may control anti-competitive practices on the basis of Article 40 of the TRIPS Agreement, and the national treatment obligation should therefore be interpreted in in a consistent manner with this provision. It should be noted, however, that this Article only permits Members to control practices that may "constitute an abuse of intellectual property rights having an adverse effect on competition," and it does not go so far as to allow regulations that cannot be rationalized, formally, in the name of competition law, or effectively, as competition policy. The same applies to the national treatment obligation under GATT. As seen in another dispute case, Chile - Taxes on Alcoholic Beverages, the absence of a rational connection between the structure of the measure at issue and the policy objective was considered to be a factor that might lead to finding a violation of the obligation. In view of this, it cannot be denied that even regulatory measures under a so-called competition law may be in violation of the national treatment obligation under Article 3 of the TRIPS Agreement if such measures cannot actually be accounted for from the perspective of competition policy.

Besides, the TRIPS Agreement, in the first place, provides for the content of rights to be protected as intellectual property, including rights of licensing. Restricting these rights under regulations that cannot be rationalized in the name of competition law, or effectively, as competition policy, would be in violation of the TRIPS Agreement, unless such regulations are accepted as exceptions under Article 17 (exceptions to trademark rights) and Article 30 (exceptions to patent rights) of the TRIPS Agreement.

3) Economic Partnership Agreements/Investment Protection Agreements

i) National treatment obligation

Economic Partnership Agreements (EPAs) provide the principal national treatment obligation relating to trade and investment, by prohibiting less favorable treatment of foreign goods, services, service providers and investors. The Japan-Singapore EPA, for example, defines national treatment obligations for the trade of goods in general (Article 13) and services (Article 60) within the scope recorded in the agreement, and for investment (Article 73). Investment Protection Agreements regulate national treatment obligations for investment, and prohibit foreign investors from being treated less favorably.

National treatment obligations relating to trade are similar to those contained in the GATT/GATS, and the considerations already detailed apply. In comparison to this, national treatment relating to investment aims to ensure that foreign investors do not suffer less favorable treatment than domestic investors “under similar conditions”. Precedents suggest that comparisons are made between the treatment of investors in the same economic/business sectors, at least, but there is the strong possibility that differing treatment will not be judged an infringement of regulations if it is shown to result from rational policy decisions. (See precedent referred to in Section 2)(a) in “Major Cases involving Investment Treaty Arbitration” (Reference 1), Section III Chapter 5 “Investment”). As a result, in these cases, too, regulations that are implemented in the name of competition laws, and which are not, on the surface, distinctions based on the nationality of the investor, may still be recognized as *de facto* infringements of national treatment obligations if there is no rational explanation of them as competition policy.

In the case of reviews of corporate mergers, for example, any distinction between the notification requirements for mergers between domestic companies and those required when an overseas company acquires a domestic company is very likely to be considered an infringement of national treatment if no agreement has been reached prior to investment regarding qualifications on national treatment, and no rational explanation can be given based on competition policy.

Furthermore, if it can be proven that there is a disparity in the criteria actually applied during reviews, it is possible to query an infringement of the national treatment obligation.

ii) Obligation to fair and equitable treatment

Chapters on investment within EPAs and Investment Protection Agreements (IPAs) entered into by Japan contain an obligation to provide fair and equitable treatment. This obligation differs from the national treatment obligation in that it is not a relative standard determined in comparison with the treatment afforded to national investors, but rather guarantee an absolute standards of treatment. Although this principle does not require developing countries to afford treatment to foreign investors equivalent to developed countries, it is understood as an obligation to take a certain level of measures in line with the development level of the country in question, even if it is a developing country, and furthermore as a prohibition against irrational measures such as discrimination or non-transparency. In the Saluka Investments BV – Czech Republic case, for example, it was judged that investors have a right to expect not to be treated in any way that is clearly inconsistent, non-transparent, irrational or discriminatory. (See Section 2)(c) in "Major Cases involving Investment Treaty Arbitration" (Reference 1), Section III Chapter 5 "Investment".)

From this, it can be assumed that even where regulations are implemented in the name of competition law, there is the possibility that an infringement of the fair and equitable treatment obligations may be acknowledged, providing rational explanation cannot be given in terms of competition policy, and regardless of whether or not foreign investors have been treated less favorably than domestic investors.

(3) Conclusions

As discussed in the previous pages, the WTO Agreement defines cases where less favorable treatment is applied to imported goods, foreign services or service providers, or overseas patent or registered trademark holders as infringements of national treatment obligations. Even if measures appear to be non-discriminatory on their face – for example, where the same regulations apply to domestic and imported products – where imported products are placed under a more severe burden than that placed on domestic like products, and where a rational explanation for this discrimination is difficult from the perspective of competition policy, the possibility must surely exist that this will constitute a *de facto* infringement of the national treatment obligation. In the same way, there must be the similar possibility of infringement of the national treatment obligations when foreign investors are placed under a relatively heavier burden than that applied to domestic investors. In cases where restrictions are imposed on intellectual property rights and the business activities of foreign investors in the name of competition law, but in fact these measures cannot be explained in terms of competition policy, the possibility must exist of an infringement of regulations related to the TRIPS Agreement, and IPA fair and equitable treatment obligations.

On the other hand, the considerations above do not consider the problem that the system itself differs in various countries. So far as rational explanations in relation to competitive policy are possible, it will be difficult to make issues such as these problems under the WTO Agreement and other international rules. Problems that arise as a result of significantly differing philosophies of competitive strategy will have to be dealt with by competing agencies and through inter-governmental agreements. Further coordination of international rules through the sharing of information and agreement processes is considered potentially helpful in this. Measures that promote transparency in applicable rules and in the judgment of individual cases will also be effective.

4. PROBLEMS IN DESIGN AND OPERATION OF CORPORATE MERGER REVIEW

(1) Problem areas

Competition authorities in various countries examine whether or not M&A activities including corporate merger and acquisition of stocks would cause problems with competitive strategies within a framework of competition laws. When a problem is determined through the review, such agencies may order the taking of problem-solving measures such as imposing the obligation that business transfer or supply occur at certain prices, or prohibiting the M&A itself. Thus, competition laws in general have a framework to examine whether or not M&A activities are desirable from the perspective of competitive strategies, and such framework is called corporate merger examination.

Competition laws including corporate merger review in various countries are designed and operated based on assumptions relating to each country's distinctive economic structures and market practices, and of course it cannot be "unfair" to say that the system and operation differ by country from the perspective of rule consistency. As mentioned in 3 above, "Discipline against the arbitrary or discriminatory application of competition laws", in cases where design and operation of competition laws are determined to be arbitrary and discriminatory, may become a problem under the WTO Agreements including GATT, GATS and the TRIPS Agreement and also under the

Economic Partnership Agreements (EPAs) and Investment Protection Agreements (IPAs). As discussed in 1. above, if competition laws are applied regardless of situations where such design and operation of competition laws does not demonstrate sufficient relevance for the country to exercise, then a problem of excessive exercise of the country's jurisdiction may arise. In many cases, the design and operation of corporate merger examinations which competition authorities of each country adopt may be considered as an issue of whether it is an appropriate use of competition laws/policies. However, in some cases they may be an issue subject to the WTO Agreement, IPAs, and jurisdiction.

Recently, as formation of competition laws in many developing countries has been progressing, a growing number of M&A cases by Japanese companies have become subject to corporate merger examination abroad. The need arose for supervision of the shape of the design and operation of corporate merger examination imposed by foreign governments, and if necessary, appeals to foreign governments for improvement of the design and operation should be taken into consideration. The relationship between the design and operation of corporate merger examination and issues of the WTO Agreements, IPAs and jurisdiction is examined below.

(2) Barriers to Market Access

The time schedule is a very important issue in planning an M&A. In order to maximize the synergy effect, rapid execution of the M&A is necessary. Delay in time schedule often results in cost increase and fall in stock prices. As regards M&A cases about which exporting companies and international companies are concerned, normally they have to accept the prior examination of the corporate merger by the foreign countries. In some cases, however, they face problems that such examination does not start promptly or is prolonged. When the cause of late start or a prolonged examination procedure is due to: lack of examiners at the authority; lack of cooperation within the companies; and the need to analyze complicated problems concerning competition laws, then it would not be appropriate to regard such problems as an issue of the WTO Agreements or IPAs.

On the other hand, in cases where an acquiring corporation is in the country where corporate merger examination is undertaken and when the late start or prolonged examination is not based on reasonable reasons, it may be claimed that this would be a trade barrier measure for foreign companies' market access and investment. Practically, controversial patterns of delay include: (1) the application for examination will not be accepted until execution of the final agreement of the M&A[20]; (2) requirement of prolonged communication with the competition authority prior to official acceptance[21]; (3)

[20] The parties involved in an M&A normally seek speedy completion of the M&A procedure by submitting a notification for corporate merger examination to each country's authorities prior to the conclusion of the final contract, and processing the corporate merger examination privately. The Chinese authority requires submission of the final contract upon official acceptance of a notification, which may be one of the reasons to the late start of examination compared to the authorities in other countries.

[21] Upon submitting the notification to the authority within the EU, the applicants use Form CO. Prior to official acceptance of notification, communication between the applicants and the authority can be required with prepared draft of notification to detect defects in documentation (*Best Practice on the conduct of EC*

no acceptance of application or delay in examination upon facing political challenge; and (4) a long review term is set without following the international standard and results in prolonged review without reasonable reasons[22]. As regards delay without reasonable reasons, if the concerned M&A case is related to situations where the market access is secured under GATS by the country which prolongs such review, infringement of GATS liberalization agreement may be examined. In case a liberalization-oriented Investment Protection Agreement (IPA) is concluded with the country which prolongs the corporate merger review[23], then whether or not such delay would infringe liberalization obligations may be considered. In any case, closer examination would be necessary regarding whether or not delaying the M&A though not prohibiting it could be considered as infringement of the liberalization agreement.

(3) Issue of Discriminatory Application Against Overseas Companies

When irrational prohibition and problem-solving measures from the perspective of competition policy are considered to be applied discriminately against foreign companies as a result of corporate merger review, then such corporate merger review would be protectionist.

In this regard, after the enforcement of the Anti-Monopoly Law in China, from 2008 until the end of January 2015, China, only two case of corporate merger applications out of 26 cases with conditions (problem-solving measures were imposed) was accepted. All of those cases were corporate acquisition, corporate merger, or establishment of joint venture companies by the foreign companies[24]. Among them are the following cases with irrational decisions from the perspective of competition policy.

(Case 1) Corporate Acquisition of China Huiyuan Juice Group by Coca-Cola Co. (March 18, 2009)

The Chinese authority prohibited the acquisition which was already completed by Coca-Cola Co. of the China Huiyuan Juice Group claiming concerns about the possible risk of Coca-Cola's increase in domination over the fruit juice drink market through cross-selling and business with exclusive conditions. However, from the perspective of competition policy, there must have been other choices, such as imposing restrictions after

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merger control proceedings, paragraph 5 to 7, January 20, 2004.) Going through such a procedure would take from a few months to six months until official acceptance. Also the length of such procedure could determine the date of official notification, and eventually such difference could determine the consequences of the following corporate merger examination (*See* the case studies on corporate merger of Sam Sung HDD by Seagate, and former Hitachi group HDD by Western Digital.)

[22] The ceiling for the duration of Japanese corporate merger examination is set either 120 days from the receipt of notification or 90 days from the receipt of all the relevant reports. On the other hand, some countries adopt longer examination period, including 330 days from the receipt of notification in Brazil, 270 days in Russia, and 210 days in India. There is no consensus regarding internationally-applicable duration.

[23] For instance, the Japan-Kuwait Investment Agreement, and Japan-Colombia Investment Agreements.

[24] *See* U.S. CHAMBER OF COMMERCE COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT: China's Anti-Monopoly Law Application and the Role of Industrial Policy, etc.

actual confirmation of cross-selling conduct or accepting the application imposing a condition to prohibit conducting cross-sell. Despite availability of such choices, the Chinese authority prohibited the corporate acquisition itself in advance, which should be considered as lacking rationality in competitive strategy; it also implied that such decision was made to protect a national brand.

(Case 2) Corporate Acquisition of Lucite by Mitsubishi Rayon Co., LTD. (April 24, 2009)

The Chinese authority imposed as a condition against Mitsubishi Rayon upon its corporate acquisition of Lucite that it not to acquire manufacturers of MMA monomer, PMMA polymer, and cast board, nor construct a new plant without authorization of Ministry of Commerce for 5 years. Such imposition is considered anti-competitive because it demands restriction over production capacity which could lead to price increases as a result.

(Case 3) Corporate Acquisition of Alcon by Novartis International AG (August 13, 2010)

The Chinese authority prohibited Novartis to sell specific ophthalmic antibiotic products in the Chinese market for 5 years, and requested termination of their sales agreement with a contact lens business partner in Shanghai. Such action is considered anti-competitive because the sales volumes would be limited and consumer choices would be narrowed.

When irrational prohibition and problem-solving measures from the perspective of competition policy are applied to corporate merger examination, then it would be a concern that such examination is operated with protectionist reason, especially to protect domestic industries. If such protectionist operation irrationally demands investors to restrict their business activity or transfer business, etc., such measures are related to “investment”, which is subject to protection under IPAs, and whether or not such measures infringe national treatment or fair and equitable treatment obligation may be examined. If liberalization-oriented IPAs exist and M&A is prohibited irrationally, then whether or not such measure is against the liberalization agreement may be examined. Further, if condition imposed against foreign companies include licensing-out to their domestic company, examination may be necessary as to whether or not such measures conflict with the national treatment obligation of the TRIPS Agreement.

(Case 4) Corporate Acquisition of Xstrata by Glencore (April 16, 2013) / Corporate Acquisition of Gavilon by Marubeni (April 22, 2013)

In the case of corporate acquisition of Xstrata by Glencore, the Chinese authority ordered the parties to sell a Peruvian copper mine, which was under development by Xstrata, to a third party. However, the total share of both parties in the copper concentrate market of concern was only 12.1%, and the existence of other special circumstances that may have significantly restricted competition in the Chinese market was also unclear. It was therefore questionable whether the structural measure of concern was indeed necessary from the point of view of competition policies.

In the case of the corporate acquisition of Gavilon by Marubeni, the Chinese authority ordered the parties to maintain their business of soybean export to, and distribution in, China separate and independent. However, the total amount of soybeans imported to China in 2012 was 58.38 million tons, of which 10.50 million tons were traded by

Marubeni and 0.40 million tons by Gavilon, and thus there would be no significant changes in the competitive environment before and after the acquisition. It was therefore questionable whether the measure to maintain separation/independence was indeed necessary from the point of view of competition policies.

(4) Issue of the Excessive Extraterritorial Application

If an M&A is made subject to corporate merger review without demonstrating sufficient relevance to the country in question and further problem-solving measures are imposed, or the M&A is prohibited by the country, an excessive application of jurisdiction may become a concern. Imposing only a requirement of notification against the company considering M&A may not be substantial enough to be regarded as a case of excessive extraterritorial application of competition laws, but attention must be paid to the fact that if a company becomes subject to corporate merger review, that company will incur substantial costs to comply with the review.

For instance, in some countries, a significantly low threshold level regarding the amount of assets and sales is set in relation to the domestic market[25]. Therefore, appropriate consideration may not have been paid in designing the standard for the notification requirement from the perspective of effects on competition in domestic market.

[25] The notification requirement in Russia is as follows: (1) the acquiring company has over 7 billion rubles in assets in the world and the acquired company has over 250 million rubles in assets in the world; (2) the acquiring company has over 10 billion rubles in consolidated net sales in the world and the acquired company has over 250 million rubles in assets in the world; and (3) either of the acquiring or the acquired companies has over 35 % of the market share.

That of Ukraine is as follows: the total assets or the sales in the world of both of the companies concerned is over 12 billion Japanese yen, and also (1) both business operators have over 100 million Japanese Yen in assets in the world or in the annual sales in total, and (2) either of them has over 100 million Japanese Yen in total domestic assets or sales (refer to “Getting the Deal Through - Merger Control 2012”).