

“EXCESSIVE” EXTRATERRITORIAL APPLICATION OF COMPETITION LAWS

The issue of “excessive” extraterritorial application of domestic law 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. We particularly note that the current U.S. extraterritorial application of antitrust laws to importing countries’ domestic market structure based on “the exporters benefit,” instead of on domestic “consumer welfare,” goes beyond the international consensus regarding extraterritorial application of competition laws. The U.S. example, above, falls under so-called “legislative” jurisdiction; recently however, “enforcement” jurisdiction has also become an issue. 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 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, which have been injured 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” 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 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.

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.

— 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.

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 the 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 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 and warnings were issued to both Microsoft Japan and its parent company in the United States. 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 abroad¹.

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

¹ In Japan’s previous treatment of these cases, such as the *Nordion* case, the documents were sent to *Nordion*’s attorney in Japan. By an amendment of Anti-Monopoly Act in 2002, the provisions of the Code of Civil Procedures are applied *mutatis mutandis* for sending documents to parties located overseas and, in certain cases, it is possible to serve by public notification, so that procedures no longer raise issues of enforcement jurisdiction.

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.” 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 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. 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.

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 commission submitted its final report to the Attorney General and Chairman of the Antitrust Bureau 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, but also states that extraterritorial application should be maintained as a possible solution. (See Section (1) below “Expected Restraint of Extraterritorial Application Through International Cooperation”.)

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.” Competition authorities are expected to exercise restraint in the extraterritorial application of these laws 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 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.² Where Country A applies its competition laws extraterritorially to a company in Country B without Country B’s official permission, 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 mailed or faxed fact-finding requests to foreign companies in the context of competition law enforcement.

² The ruling by the Permanent Court of International Justice (precursor of the International Court of Justice) in the *Lotus* case, noted that “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” A leading journal in this area, “Oppenheim’s International Law” (Robert Jennings & Arthur Watts, 9th ed. 1992), also states that “a State is not allowed ... to exercise an act of administration or jurisdiction on foreign territory without permission.”

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. 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, and no internationally accepted method has yet emerged.

4) Recommended Actions

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,³ 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.⁴ Japan

³ See *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997). This was the first case to examine the extraterritorial application of U.S. competition law criminal provisions. Around 1990, several Japanese paper manufacturers increased the price of thermal printing fax paper exported to the United States. In December 1995, the U.S. Department of Justice filed suit against one of the companies alleging that it had taken part in cartel activities within Japan. In September 1996, the Federal District Court for Massachusetts rejected the complaint and expressed reservation regarding the use of the effects doctrine to justify extraterritorial application in criminal cases. However, in March 1997, the Circuit Court overturned the District Court’s ruling, finding no reason to interpret the law differently with respect to civil and criminal cases. In January 1998, the U.S. Supreme Court refused to hear the case, allowing the Circuit Court’s ruling to stand.

⁴ In December 2000, a group of 12 companies purchasing vitamin tablets in Ecuador, Panama, Mexico, Belgium, UK, Indonesia, Australia, Ukraine and other countries filed suit against 46 vitamin tablet

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. 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*.⁵

It is important to insist actively and continuously that countries refrain from unilateral and “excessive” extraterritorial application of their competition laws and to promote bilateral or multilateral co-operation.

manufacturers in the United States, Germany and other countries under US Antitrust Law. Six Japanese companies were named as defendants. Plaintiffs sought treble damages as a result of the defendants allegedly conspiring to form an international vitamin cartel. Initially, the US Federal District Court rejected the claim on the basis of lack of jurisdiction. However, the US Court of Appeals overturned the lower court’s ruling in January 2003, finding that the FTAIA granted the lower court jurisdiction. Defendants appealed the case to the US Supreme Court, which accepted the petition in December 2003. The Supreme Court issued a ruling in June 2004 based primarily on the damages caused to the parties outside the US territory. However, the US Supreme Court determined that the US Antitrust Law (the Sherman Act) should not be applied to damages caused outside the US territory, and remanded the case back to the US Court of Appeals without making any decision on the plaintiff’s claim that “effects by cartels outside of the US territory have connections with its effects within the US territory” because there had been no deliberations and decisions made in appeal hearings. In June 2005, the US Court of Appeals determined that damages caused by cartels outside the US territory were independent of those within the US territory, and jurisdiction should not be granted. In October 2005, the plaintiff asked the US Supreme Court to accept an appeal, but in January 2006, the US Supreme Court accepted the decision by the US Court of Appeals and rejected their appeal. Finally the ruling of the US Court of Appeals was accepted and the lower court jurisdiction was not granted for this case. In the Ruling by the US Supreme Court in June 2004, the Supreme Court cited the Statements of Position submitted by Germany, Canada and Japan in those applying treble damages under US Antitrust Law against a violation that occurred outside US territory would constitute an encroachment of sovereignty *vis-à-vis* foreign countries.

⁵ The above vitamin lawsuit, this case involved the issue of material jurisdiction of a US domestic court. In May 2005, the Federal District Court for Minnesota handed down a judgment recognizing the material jurisdiction of a federal court. However, in October of the same year, the regional court overturned its initial judgment (in June of the same year, in a remand of the vitamin lawsuit, jurisdiction was denied). Because jurisdiction was denied, the plaintiff submitted an appeal to the Eighth Circuit Federal Court of Appeals. In February 2006, the court of appeals did not recognize any direct connection between damage arising outside of the United States due to a cartel and damage arising inside the United States, and thus the plaintiff’s claim concerning material jurisdiction was rejected.

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.

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* case⁶ raised questions on the “effects doctrine” which affirmed the extraterritorial application of laws whenever

⁶ *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.

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,⁷ the U.S. Supreme Court confirmed that 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.

⁷ *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 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 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 because the Sherman Act did not apply. In 1993, however, the 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.

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.

(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.

More than ten bilateral cooperation agreements have been concluded, including: U.S.-Germany (1976), U.S.-Australia (1982, 1999 revision), U.S.-Canada (concluded in 1984, amended in 1995), Germany-France (concluded in 1984), U.S.-EU (concluded in 1991, amended in 1998), Australia-New Zealand (1994), 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 country requests the other to enforce competition laws and the other country begins the 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 the clashes caused by extraterritorial application of competition laws and to foster cooperation in dealing with anti-trust activities occurring beyond the borders.⁸

⁸ 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 in the GE-Honeywell merger and others based on the exchange of information from the initial stage of investigations. In addition to mergers, the Microsoft case also was resolved based on 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 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.

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 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 July 2003, with Canada in September 2005. Japan also has been carrying out a study to explore an agreement with Australia since May 2003.

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” in November 2002, the “Japan-Mexico Economic Partnership Agreement” in April 2005, and the “Japan-Malaysia Economic Partnership Agreement” in July 2006, all of which include bilateral cooperation concerning competition policy. Moreover, in economic partnership agreement negotiations between Japan and Thailand, the Philippines, Indonesia, and Chile, progress toward reaching a general agreement is evident, as indicated by the bilateral cooperation concerning competition policy included in the content of negotiations.

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* 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.⁹)

⁹ At the trial stage of the *Thermal Fax Paper* case (see supra, note 3 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 the 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

(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 has discussed the impact of trade measures on competition and other issues. At the Fourth Ministerial Conference held in November 2001, parties agreed to begin preparatory work toward launching negotiations after the Fifth Ministerial Conference on establishing a framework for competition policy. Since then, the Working Group has 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 to include 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, during the period of the current Round, preparatory work toward launching negotiations 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 jurisdiction is 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. At present, approximately 99 competitive authorities participate in the Network, continuing deliberations at workshops such as the Workshop on Cartel and the Workshop on Mergers.

Criminal Code, the Japanese government appears to have determined that such theoretical dual criminality existed.

Data: “When Foreign Governments Directly Request Japanese Companies to Buy Foreign products” (1995 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners, Appendix III)

1. Introduction

(1) In January 1995, the World Trade Organization (WTO) came into effect, following conclusion of the Uruguay Round negotiations. The WTO rules are stricter and will be applied more widely than the GATT rules. As competition intensifies in the world economy and concerns of each country become more serious, frustration and criticism against trade-partner’s trade policies and measures have been growing among countries, and there have been new problems occurring such as trade policies that set numerous goals.

(2) The subcommittee took the standpoint that “All are sinners”, that is, all trade policies and measures have some problems and there are no faultless countries. It insisted that we should solve problems in a calm objective manner based on agreed international rules such as the WTO rules, instead of only criticizing partner’s trade policies and measures according to unilateral criteria. Based on this viewpoint, the subcommittee published opinions to clarify problems in trade policies that set numerical goals (*see* Note 1 below), when the US government, during Japan-US comprehensive negotiations requested the Japanese government to control such as market shares of foreign products in private companies’ procurement. As is stated in the recommendation by the Subcommittee on Basic Issues of the Industrial Structure Council (*see* Note 2 below), improvement in market access in Japan should be realized through strengthening competitive policies such as the relaxing of government regulations and restrictions on cartels by the Anti-monopoly Act, not through methods including numerical goals set unilaterally that abandon the market-economy principles on which the GATT/WTO rules are made.

(3) Fortunately, Japan-US comprehensive negotiations have progressed, abiding by these market-economy principles. However, the US government recently stated that voluntary programs that Japanese auto makers had published regarding purchase of foreign-made auto parts (predicted amount of purchase) were not sufficient and that they would directly request Japanese makers to implement another voluntary program (*see* Note 3 below) (hereinafter this request is referred to as “a case purchase request” or “case purchase requests”).

(4) As globalization has progressed and Japan has become a rich country, it is not surprising that foreign governments urge Japanese companies to voluntarily purchase foreign-made goods. It is not a problem as long as foreign governments’ requests purely urge Japanese companies to purchase foreign-made goods. However, if foreign governments use any form of threat or pressure on companies to deprive them of their freedom in procurement, such requests are considered to be “virtually compulsory” and might pose a serious problem. Furthermore, if they imply “that some kind of retaliation

is possible in the case of the request being rejected”, this also poses a problem because this deprives free decision in procurement.

(5) As for compulsory purchase requests, the Japanese government has already expressed that it will “oppose any requests that lead to unfair discrimination, compulsion, or interference to Japanese makers”. This subcommittee also hopes strongly that such unfair discrimination, compulsion or interference will not occur. To stimulate the interest of affected parties, we will report results of legal analysis on issues predicted to occur if there is any substantial compulsion.

2. Consistency with the WTO rules

(1) The GATT/WTO aims to enlarge world trade through eliminating trade barriers and discriminatory treatment. However, compulsory purchase requests might be inconsistent with the purpose of the GATT/WTO. Firstly, if a compulsory purchase request urges private companies to make a commitment on future purchases by concrete numbers (numerical goals), it is highly likely to violate market-economy principles, on which the GATT/WTO rules are made. As was pointed out in the opinions this subcommittee published in 1994, such a result-oriented approach might reduce economic efficiency and economic welfare and run counter to the spirit of the GATT/WTO, which aims at “developing complete utilization of world resources”.

(2) Secondly, a compulsory purchase request might lead to requests for discriminatory treatment inconsistent with the principle of most-favored-nation treatment defined in Article 1 of the GATT. There is a concern -- with regard to the US government -- that purchase requests for US-made parts for Japanese transplants in the US might be for the purpose of securing favorable treatment of US-made goods as a whole. The EU has already expressed their worries to the Japanese government that the principle of MFN treatment might be ignored.

(3) Thirdly, the issue is whether compulsory purchase requests will have the effect of enlarging trade. Some world-famous economists perceive problems in trade policies that set numerical goals, but state that “adopting trade policies that set numerical goals is better than doing nothing (can be evaluated as second best) if free competition is restricted by structural barriers and foreign trade practices in importing countries.” This subcommittee, being against this opinion, offered a counterargument published in 1994. In particular, the idea that “problems included in means can be admitted if trade really expands” lacks a premise in cases where trade does not expand. Expanding purchase of foreign-made auto parts by parent companies in Japan will enlarge trade, but expanding purchase of foreign-made parts by Japanese transplants in the US will diminish US imports of parts (import replacement). In particular, when considering that purchase by the latter significantly exceeds that of the former at present (*see* Note 4 below), the diminishing effect of the latter might be larger than the expanding effect of the former, resulting in reductions in international trade as a whole.

(4) As mentioned above, compulsory purchase requests are likely to be inconsistent with the basic principles and the spirit of the GATT/WTO, and might violate the GATT/WTO rules in a more concrete way. Article III, Clause 4 of the GATT and Article 2 of the TRIMS Agreement (and Clause 1 of the Annex Illustrative List) ban actions to oblige or induce purchase of domestic products (local content requirements) because they violate national treatment regarding goods, considered to be discriminatory treatment of foreign-made goods in favor of domestic goods. If favorable treatment of US-made parts by Japanese transplants in the U.S. is forced substantially, this will violate above-mentioned Articles as typical local content requirements (*see* Note 5 below).

(5) If compulsory purchase requests force favorable treatment of US-made parts, it will cause Japanese transplants in the U.S. to reduce imports of parts made in Japan and third countries. Such an action may be a Quantitative Restriction that violates Article XI, Clause 1 of the GATT (*see* Note 6 below). Furthermore, such an action may have effects similar to those prescribed in the Safeguard Agreement, ultimately protecting the US parts industry in the supply of auto parts by replacing imported goods with domestic goods. Article 11, Clause 3 of the Agreement on Safeguards stipulates that governments should not encourage or support private companies to take measures that have the effect of restricting imports. Therefore, case purchase requests that encourage or support substantial compulsion for Japanese transplants to prioritize US-made parts (as a result restricting imports of parts made in Japan and third countries) might violate this Clause (*see* Note 7 below).

3. Consistency with the Japan-US Amity, Commerce and Navigation Treaty

(1) The Japan-US Amity, Commerce and Navigation Treaty bilaterally stipulates national treatment for persons (foreign investment companies), as well as national treatment for goods (imported foreign goods) defined in the GATT/WTO rules (see Article III, Clause 4 of the GATT, Article 2 of the TRIMS Agreement, and section 2.(4)) above.

(2) Therefore, if a compulsory purchase request is substantial compulsion to Japanese auto makers in the U.S., this action violates the obligation of national treatment for persons defined in Article 7, Clause 1 of this Treaty since Japanese companies in the U.S. have policies imposed that are not applied to US auto makers in the U.S. Clause 4 of the same Article also stipulates the obligation of most-favored-nation treatment for persons. Therefore, if the restriction imposed on Japanese companies in the U.S. is not applied to companies of third countries, this will also violate the obligation of most-favored-nation treatment defined in this Clause (*see* Note 8 below).

(3) The above-mentioned action also works to restrict procurement of imported parts made in Japan by Japanese transplants in the U.S., as mentioned in 2. (5). Such an action violates the obligation of national treatment for goods because it discriminates between imported parts made in Japan and US-made parts, and is considered to violate

not only the obligation defined by the GATT/WTO but also the obligation defined in Article 16, Clause 1 of this Treaty (*see* Note 9 below).

4. Other legal issues

(1) As international relationships have become remarkably closer, contact between nations should be made under mutual agreements. As for issues relating to auto parts, the Japanese government has repeatedly expressed its attitude that “the government should not intervene or give instructions for private companies’ procurement”. If the US government makes an above-mentioned request, an action that the Japanese government has clearly opposed will be exercised in Japan. This might be considered “unfair interference to other countries’ domestic administration” under international law (*see* Note 10 below).

(2) One of the basic principles of international law is that “any country should not exercise public authority in other countries’ territories without gaining their consent” (*see* Note 11 below). If compulsory purchase requests are considered a mandatory, compulsive, and authoritarian “duty” in Japan, this is likely to be an “exercise of public power” violating the above-mentioned basic principles, regardless of whether companies respond to the request or not.

(3) This report has carried out analysis based on international rules common to Japan and the U.S., such as the WTO rules, the Japan-US Amity, Commerce and Navigation Treaty, and basic principles of international law. However, if a compulsory purchase request in practice is accompanied by substantial compulsion, problems might occur in relation not only to international rules but also to the Anti-monopoly Acts of the two countries. If Japanese companies or their transplants in the U.S. mutually agree on the scale of purchase enlargement and purchase conditions as a result of a case purchase request, this might be a breach to the Anti-monopoly Acts of each country (*see* Note 12 below).

(4) There are differences between Japan and the U.S. regarding whether or not civil lawsuits (private lawsuits) are admitted for Anti-monopoly Act violations. However in the U.S., where punitive liability claims are admitted, there has been an accumulation of judicial precedence, under which certain agreements are considered to have been made even without specified agreements between companies and liability claims sometimes have been allowed (*see* Note 13 below).

(5) If Japanese transplants in the U.S. jointly discriminate against imported parts from Japan and third countries as a result of a compulsory purchase request, it is a domestic problem of the U.S. how this is judged under the US Anti-monopoly Act. However, considering the above-mentioned judicial precedents and the US culture willing to resort to lawsuits, if Japanese transplants discriminate between imported parts from Japan and third countries, there is a possibility that importers of these parts, who suffer from disadvantage in business, might file punitive liability claims for Anti-monopoly Act violations. The US government once admitted the possibility of these lawsuits. Since negotiations for voluntary restraints on automobile exports to the U.S. held at the beginning of the 1980s, the US government has taken an attitude that “the

government should not directly make contact with foreign public companies” to avoid these problems (*see* Note 14 below).

(6) Compulsory interference of government in private companies’ procurement, such as through compulsory purchase requests, is completely inappropriate, as this will not only make the government violate international rules such as the WTO rules as mentioned before, but also cause unreasonable burdens such as legal risks under the above-mentioned Anti-monopoly Act, on private companies that are interfered with.

Note 1: January 19, 1994, A Report by the Subcommittee on Investigation of Policies/Measures Against Unfair Trade, Uruguay Round Sectional Meeting, the Industrial Structure Council, “An Opinion on Trade Policies that set Numerical Goals” (compiled in the “1994 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners”)

Note 2: June 16, 1994, A Report by the Subcommittee on Basic Issues, the Industrial Structure Council

Note 3: In 1992, Japanese auto makers published a voluntary program regarding the predicted future purchase of US-made auto parts. Some makers published their own programs in March 1994, but the US government considered these programs as insufficient. The US government requested Japanese auto makers to carry-out the following two points;

(i) To publish new estimates of the imports of foreign-made auto parts for production of automobiles in Japan; and

(ii) To publish new estimates of purchase of US-made parts for production of automobiles by manufacturing subsidiaries in the U.S. (Japanese transplants) in the U.S.

As for (ii), if a request is not made directly to a Japanese transplant but to a parent auto maker in Japan, the request is considered to have been made to the Japanese transplant substantially and legally.

Note 4: According to data by the Japan Automobile Manufacturers Association, the total amount of US-made auto parts that Japanese transplants purchased in FY1993 was approximately 12.9 billion dollars, which was more than four times larger than the total amount of US-made auto parts that parent companies in Japan purchased during the same period (approximately 2.6 billion dollars).

Note 5: Trade-related Investment Measures (TRIMs) here refer to requesting companies to purchase products produced domestically or products supplied by domestic suppliers. This is considered to be a breach of national treatment defined in Article III:4 of the GATT, regardless of whether the request specifies certain products or either the quantity or the amount of products. Clause 1 of the Annex Illustrative List of the TRIMs Agreement stipulates that TRIMs include not only mandatory provisions but also those that companies need to observe to gain “advantage”. “Advantage” here is considered to include avoiding retaliation (avoid disadvantage). In this case, local content requirements and retaliation predicted in cases of rejecting the relevant request are substantially connected, but in reality, retaliation is not legally systematized. However, such substantial connection is considered a breach of national treatment defined in Article III, Clause 4 of the GATT. GATT panels concerning the above-mentioned interpretation are as

follows: (i) *EEC Panel on Parts and Components* (BISD 37S/132,1990), which concluded it was a breach of Article III, Clause 4 of the GATT for the EU to take measures to urge Japanese copying machine plants in the EU to make changes in procurement methods of parts (reduction of the percentage of imported parts made in Japan), and suggested a suspension of disadvantageous measures (anti-dumping investigations of relevant Japanese-made parts) if they comply with the request; and (ii) *Canada FIRA Law Panel* (BISD 30S/140, 1984), which concluded that even a local content individually agreed through “private contractual arrangement” between foreign investment companies and accepted by the Canadian government, is a breach of Article III, Clause 4 of the GATT

Note 6: Article XI, Clause 1 stipulates that “No ... restrictions other than duties, taxes ... whether made effective through quotas, ... or other measures, shall be instituted or maintained by any contracting party on the importation of any product ...”. “Other measures” here covers a wide area, including substantial measures other than compulsory ones through such means as quotas or import licenses. A GATT panel concerned with the above-mentioned interpretation, is the *Japan Panel on Semiconductors* (BISD 35S/116, 1988). This panel concluded that even substantial export restriction measures that are not obligatory institutionally are considered as quantitative restrictions banned in Article XI, Clause 1 of the GATT, if: (i) there are reasonable grounds for believing that companies have sufficient incentive to follow the relevant measures (or otherwise, sufficient disincentive); and (ii) the effectiveness of the export restriction measures substantially is considered to depend on the government’s action or intervention. This panel deals with export restrictions, but this interpretation also can be applied to cases of import restriction.

Note 7: If this measure is a safeguard to protect the auto parts industry in the U.S., import restriction for protecting domestic industries must be implemented following Article XIX of the GATT and provisions related to the Safeguard Agreement. However, the US government has not offered any explanation to ensure consistency with these provisions. Article 11, Paragraph 1 of the Safeguard Agreement prohibits “grey measures” such as voluntary export restraints by governments and orderly marketing arrangements. Based on this, Paragraph 3 of the same Article stipulates that “Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in Paragraph 1”.

Note 8: According to Article 7, Clause 1 of this Treaty, the U.S. is obliged to grant treatment that is not more disadvantageous than for US companies managed by US citizens or US companies (national treatment for persons) “with regard to all the matters related to business” to US companies managed by Japanese citizens or Japanese companies. Furthermore, according to Clause 4 of the same Article, the U.S. is obliged to “grant most-favored-nation treatment with regard to matters defined in this Article (Article 7 including above-mentioned Clause 1) in any case” to US companies managed by Japanese citizens or Japanese companies.

Note 9: According to Article 16, Clause 1 of this Treaty, the U.S. is obliged to grant national treatment “with regard to all the matters that affect sales, use, ...” in the U.S. to imported products from Japan (auto parts made in Japan in this case).

Note 10: ‘Oppenheim’s International Law’ (Robert Jennings and Arthur Watts, 9th ed. 1992, p.386), which is the most representative academic book in this field, quotes Resolution in 1965 (GA Res. 2131 (XX)/Rev.2/ 1966) and Resolution in 1970 (So-called “Declaration on Friendly Relations”, GA Res. 2625 (XXV)/ 1970) at UN

General Assembly, and states that “No State has the right to intervene, directly or indirectly, for any reason what ever, in the internal or external affairs of any other State ...” and that “no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to ... obtain advantage from it ...”.

- Note 11:** Judicial decision in “*Lotus Case*” by the Permanent Court of International Justice (1927), which is the most famous precedent for the above-mentioned point, states that “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 ...”. Above-mentioned Oppenheim’s International Law states that “a State is not allowed ... to exercise an act of administration or jurisdiction on foreign territory, without permission”.
- Note 12:** If Japanese auto makers agree to increase procurement (imports) of foreign-made parts, such action might be a breach of the Japanese Anti-monopoly Act, depending on the forms of agreement or the degree of restrictions on competition. If Japanese transplants in the U.S. agree to increase procurement of US-made parts in the U.S., this might also pose a problem under the US Anti-monopoly Act.
- Note 13:** There have been cases as follows: a movie distribution entity signed an agreement separately with theater owners on the minimum entrance fee, but each of them knew that competitive theater owners would sign the same agreement (*Interstate Circuit v. United States*, U.S. Supreme Court (1939)); an auto maker negotiated separately with affiliated dealers not to deal with discount shops, but each dealer knew other dealers had received similar requests (*United States v. General Motors, Corp.* U.S. Supreme Court (1966)); a hospital created a “political climate” to give nurses no options and forced them to use affiliated service providers preferentially (*Key Enterprises of Delaware, Inc. v. Venice Hospital*, U.S. 11th Circuit Court (1940)); and even though a government authority had some connection with an Anti-monopoly Act violation, that was not considered as a ground to exempt the responsibility of the business entity (*United States v. Socony Vacuum*, U.S. Supreme Court (1940)).
- Note 14:** When voluntary restraints on automobile exports to the U.S. were negotiated between Japan and the U.S. in 1981, the Attorney General sent a warning in response to an inquiry from then-USTR Brock. This reply points out that direct contact with Japanese auto makers by the US government might cause a lawsuit based on an Anti-monopoly Act violation, saying “we believe that any talk of import regulation should be held within government-level negotiations, and direct contacts and negotiations between (the US government) and foreign private companies should be avoided, regardless of being between separate companies or among groups”. This reply is considered to have been based on the above-mentioned judicial precedents. As mentioned before, voluntary export restraints (VER) are now clearly prohibited in Article 11 Paragraph 1 of the WTO Safeguard Agreement.