“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” 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.

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.

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) 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).

In the past, the provisions of the Code of Civil Procedures on sending documents abroad were not 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) 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).

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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 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 (2) 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 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 laws but also in the case of applying the laws on conduct 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. 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. 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**

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, 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. Japan
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.

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 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.
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 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, 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.

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.

The Gas Insulated Switchgear (GIS) 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.

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 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.

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 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” in November 2002, the “Japan-Mexico Economic Partnership Agreement” in April 2005, the “Japan-Malaysia Economic Partnership Agreement” in July 2006, the “Japan-Chile Economic Partnership Agreement” in September 2007, and the “Japan-Thailand Economic Partnership Agreement” in November 2007, all of which include bilateral cooperation concerning competition policy. The Japan-the Philippines, Japan-Indonesia and Japan-Vietnam EPA, which have already come into effect, also include bilateral cooperation concerning competition law.

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.)

(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 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 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 March 2011, 114 competitive authorities from 100 countries/regions participated in the Network, continuing deliberations at workshops such as the Workshop on Cartel and the Workshop on Mergers. Recently, in April 2010, the 9th Annual Conference of the ICN was held in Istanbul, Turkey.

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. It is expected that further progress will be made in the systemic revision, taking into consideration the international harmonization of competition laws.


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 on Investigation of Policies/Measures Against Unfair Trade 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 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 progressed, abiding by these market-economy principles. However, the US Government 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 hoped strongly that such unfair discrimination, compulsion or interference will not occur. To stimulate the interest of affected parties, it said it would 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 2: June 16, 1994, A Report by the Subcommittee on Basic Issues, the Industrial
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 value 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 complied 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 whatever, in the internal or external affairs of any 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 …”. 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 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.

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**Column:**

**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, Vietnam 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. These successes 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, with infringement of the WTO Agreement and/or other international rules. The aim of this report is to clarify the framework for the relevant considerations.

1) Outline of legal disciplines
2) 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 the 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 defines 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 merely apply to legal discrimination that defines different treatment of products depending on their country of origin. The possibility is also acknowledged that the national treatment obligation 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, furthermore, allow such measures as listed in the article to be counted as outside the application of the GATT, but do not include measures taken in line with competitive policy objectives. As a result, measures taken in line with competitive policy objectives are not within the scope of the exceptions in Article XX, and 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 a 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 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 agreements (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 expressly stipulated as 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.

The TRIPS Agreement provides the national treatment obligation in Article 3.1. These obligations, which apply only with regard to the "protection of intellectual property," mean that each Member country shall not accord to nationals of other Members less favorable treatment than it accords to its own nationals. 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 wherein 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 the 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, and 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 in this case, 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 discrimination by law, 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
at issue was the fact 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 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
factual 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
seat 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 said 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 is considered to be a factor that may 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) provides principal national treatment obligation relating to trade and investment, where prohibit 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 document, 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 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 merger, 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 obligation to take a certain level of measures in line with the 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 to 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 applicable 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.