Chapter 14

UNILATERAL MEASURES

1. OVERVIEW OF RULES

In this chapter, a unilateral measure is defined as a retaliatory measure which is imposed by a country without invoking the WTO dispute settlement procedures or other multilateral international rules and procedures, and which is based solely upon the invoking country's own criteria.

History of Unilateral Measures

The United States, to this point, is the most frequent user of unilateral measures, which also tend to be the most problematic. The EU and Canada also have procedures of one form or another that are similar to the United States', but these were introduced to provide a means of retaliating against unilateral measures taken by the United States and are procedurally limited and applied only with extreme caution.

A review of post-war U.S. trade policy shows two main streams of thought that later diverged upon the passage of the Trade Act of 1974.

Prior to the 1970s, the Trade Expansion Act of 1962 gave the president wide-ranging trade authority. The Kennedy Administration used substantial tariff reductions to pursue trade liberalization and brought new rigor to the application of escape clauses. Its strategy was to maintain the principles of trade liberalization and only applied remedy measures for damages incurred by liberalization. Therefore, treating remedy measures as the "exception" rather than "rule." However, there was domestic dissatisfaction with the process used by the Kennedy Administration; the Department of State conducted the negotiations and did not necessarily reflect the wishes of domestic interest groups. This resulted in the establishment of the Special Trade Representative (STR), the predecessor of the USTR. This laid the groundwork for the system later established with the passage of the Trade Act of 1974.

The increasing U.S. trade deficit and oil crisis of the nineteen-seventies combined to increase protectionist pressure on Congress to relax the conditions for invoking trade remedy measures. In 1971 the United States recorded its first trade deficit of the 20th century. It was against this economic backdrop that the Trade Act of 1974 was passed, relaxing the requirements for relief under the escape clauses measures and incorporating a new "Section 301" authorizing retaliatory measures against unfair trade policies in foreign countries.

In the Reagan Administration of the late 1980s, the United States carried enormous trade deficits, and Congress' dissatisfaction (symbolized by the "Gephardt Amendment") eventually led to the passage of the Omnibus Trade and Competitiveness Act of 1988. This law reduced presidential discretion over the invocation of unilateral measures against foreign practices, policies, and customs deemed by the United States to be unfair, and granted wide-ranging authority to the USTR to deal with these cases. It also included a new "Super 301" that automated the procedures to be taken from the investigation of unfair foreign trade measures to the invocation of unilateral measures. This law made it significantly easier for the United States to take unilateral measures.

The United States has repeatedly used unilateral measures as an instrument for settling trade disputes to its advantage. Such actions are typified by Section 301 of the Trade Act of 1974. Under this provision, the United States may unilaterally determine that a certain trade-related policy or measure of another country is "unfair" without following the procedures provided by the relevant international agreements. In the name of rectifying "unfair" practices, the United States has often threatened to use unilateral measures, and occasionally implements such measures to coerce the target country into changing the trade laws or practices at issue.

Why Are Unilateral Measures Problematic?

First, unilateral measures are inconsistent with the letter and the spirit of the WTO, which is founded on the principle of multilateralism and the consensus and cooperation that flow from it. Article 23 of the Dispute Settlement Understanding ("DSU") explicitly prohibits Members from invoking unilateral measures that are not based on the WTO dispute settlement procedures. The multilateral trading system is marked by countries observing

international rules, including those provided by the WTO Agreement and its dispute settlement procedures. Disputes occurring within the system should be resolved by the available dispute settlement procedures, not through resort to unilateral measures.

Second, where agreements are reached through the threat or use of unilateral measures, the multilateral system may suffer. In particular, bilateral agreements secured under the threat or use of unilateral measures tend to deviate from the principle of MFN treatment, which is the most fundamental component of the multilateral framework under the WTO.

Unilateral Measures Cannot Be Justified

There are two popular rationales for unilateral measures. The first is that since international rules are incomplete, both substantively and procedurally, defiance of these rules is justified to make existing rules function more effectively. The other rationale, based on economic or political theory, argues that credible threats of unilateral measures are effective in maintaining a free trading system from a strategic viewpoint.

Neither rationale, however, is persuasive. First, as we discuss in more detail below, the WTO Agreement has a much wider scope of coverage and stronger dispute settlement procedures than previous trade agreements, and these enhancements destroy whatever rationale there may have once been for “justified” defiance.

The second rationale of “strategic justification” has also been lost with the development of dispute settlement procedures, which have introduced WTO-controlled retaliatory measures.

Furthermore, bilateral agreements reached in negotiations conducted under the threat of unilateral action have too often departed from the MFN principle. From this standpoint, unilateral measures are not an effective means of achieving enhanced free trade that benefits all, as sought by the WTO.

2. LEGAL FRAMEWORK

The WTO dispute settlement mechanism is the only forum for WTO-related disputes. Unilateral measures that are not consistent with WTO obligations, such as unilateral tariff increases and quantitative restrictions, are prohibited. Such measures violate several provisions of the WTO Agreement: Article I (General MFN Treatment), Article II (Schedules of Concessions), Article XI (General Elimination of Quantitative Restrictions), and Article XIII (Non-Discriminatory Administration of Quantitative Restrictions). In addition, the threat of unilateral tariff increases may have an immediate impact on trade, nullifying and impairing benefits accruing to the injured country under the WTO Agreement. In the past, the United States has rationalized its need to use unilateral measures by arguing that the GATT dispute settlement procedures were not effective. Inefficiency, however, can no longer be used as a justification for departing from dispute settlement procedures, because the DSU provides for a strict timeframe and greater automation to ensure quick dispute settlement.

Rules on the WTO Dispute Settlement Procedures

The WTO dispute settlement procedures provide the following two rules, which go further than previous dispute settlement systems in clearly prohibiting the use of unilateral measures concerning issues within the scope of the WTO rules.

1. Clear Obligation to Use the WTO Dispute Settlement Procedures

The new WTO agreement states clearly that all disputes must follow the WTO dispute settlement procedures, and explicitly bans unilateral measures not conforming to these procedures. The use of unilateral measures in contravention of these procedures is itself a violation of the WTO Agreement. Article 23 of the DSU, which is a part of the WTO Agreement, stipulates that when a WTO Member seeks redress for a breach of obligations, nullification or impairment of benefits under the covered agreements, or for an impediment to attaining any objective under the covered agreements, the WTO Member shall follow the rules and procedures set forth in the DSU.

Although it should be obvious that the settlement of WTO-related disputes should be governed by the WTO dispute settlement procedures, the fact that this principle has been explicitly stated represents a significant step forward.

2. Expanded Coverage of the Agreement

The WTO Agreement expands the GATT coverage from goods alone to include trade in services and intellectual property rights. As will be discussed later in this chapter, in addition to disputes involving trade in goods, the United States has applied Section 301 in an effort to open markets for services or to increase the level of protection afforded intellectual property rights. Under the WTO Agreement, however, there is no longer any justification for the United States to ignore multilateral processes and resort to unilateral measures in these areas.

In light of the two considerations above, we have categorized the forms of unilateral measures based on: (1) the nature of the underlying dispute, (*i.e.*, whether the country imposing the unilateral measures claims damages based on a WTO violation or damages in areas not covered by the WTO, and (2) the nature of the measures enacted (i.e., whether the measures violate the WTO Agreement – for example, tariff increases within bound rates). Figure 14-1 below discusses whether these various unilateral measures are consistent with the WTO Agreement. As indicated in the chart, the measures in question, except for item D, may violate Article 23 of the DSU and/or the measure itself is inconsistent with the WTO Agreement.

In the case in Quadrant D, a violation of Article 23 of the DSU or a unilateral measure would not itself constitute a violation of the WTO Agreement, for example unilateral measure could be taken against "a trading partner's violation of the WTO Agreement," even though in actuality the measure would be taken against a trading partner's measure justified under the WTO Agreement (which would be the case for Quadrant A or B). If this is the case, the enforcing country could unreasonably escape the WTO violation. To avoid this problem, it should be made clear that whether each case is related to the WTO Agreement should be judged objectively according the rules of dispute settlement.

Figure 14-1

Unilateral Measures and WTO Coverage

		Unilateral measures	
		In violation of the WTO Agreement	Not in violation of the WTO Agreement
Underlying Disputes	WTO-related disputes	A Violation	B violation
	WTO non-related disputes	C Violation	D

Notes:

1. For items A and B, utilization of the WTO Dispute Settlement Procedures is required according to Article 23 of the DSU. Unilateral measures in these situations are thus inconsistent with Article 23 of the DSU.
2. For item C, the measure in question will be inconsistent with the WTO Agreement.
3. For item D, there is no violation of the WTO Agreement (though there remains the option of a non-violation complaint for the injured country). As the scope of the WTO Agreement has expanded dramatically, the range of D, to which the WTO does not apply, has shrunk dramatically.

4. ECONOMIC IMPLICATIONS

Retaliatory measures that are not based on the WTO dispute settlement procedures have enormous potential to distort trade. Tariff hikes and the like are themselves distortive of trade; their unilateral application is likely to provoke retaliation from the trading partner, leading to a competitive escalation of retaliatory tariffs. Unilateral measures are often based on domestic interests (i.e., protection of domestic industries and profits for exporters), and once procedures are initiated it may be extremely difficult domestically to suspend or terminate them.

It should be clear that unilateral measures reduce trade both for the country imposing them and the country against which they are imposed. They are detrimental to the domestic welfare and economic interests of both countries, and impair the development of world trade. One need only recall the competitive hikes in retaliatory tariffs during the 1930s and the vast reductions in trade and worldwide economic stagnation that they produced.

5. MAJOR CASES

THE UNITED STATES

"SECTION 301 OF THE TRADE ACT OF 1974"

The Japan-U.S. Auto Dispute

The Japan-U.S. Auto Dispute was the first case in which a Section 301 action was challenged under the WTO dispute settlement procedures. The United States initiated a Section 301 investigation of the Japanese aftermarket for auto parts on 1 October 1994, and announced sanctions on 5 May 1995. The United States proposed unilateral measures that would impose 100-percent import duties on Japanese luxury automobiles. In response to this unilateral threat, Japan immediately requested consultations pursuant to GATT Article XXII with the United States. Ultimately, this dispute was settled through bilateral negotiations outside the WTO consultations, but the fact that the dispute was referred to the WTO dispute settlement procedures and that negotiations took place before the international community

was quite integral to achieving a resolution in conformity with international norms and without inducing a trade war.

The Japan-U.S. Film Dispute

The United States sought bilateral negotiations with Japan in this case under Section 301, but Japan's adamant opposition to negotiations on such grounds resulted in the case being brought before a dispute settlement panel. The thrust of the U.S. claim was that the actions of the government of Japan in relation to consumer photographic film and photographic paper were in violation of GATT Article XXIII:b. Rather than arguing that the measures taken were themselves violations of the WTO Agreement, the United States argued that the measures nullified and infringed upon the interests of other countries under the Agreement. The panel, however, rejected all the U.S. claims.

In the Japan-U.S. Film Dispute, the United States announced that it views statements made in the government of Japan's legal submissions to the WTO dispute settlement panel as "commitments" subject to monitoring to ensure their implementation. Based on this position, the United States released its first "Monitoring Report" in August 1998. The U.S. position is untenable. Like all submissions to the WTO dispute settlement panels, Japan's submissions in the Film Dispute were representations of the historic factual circumstances and legal principles at issue in the particular case. The U.S. characterization of these factual representations about the past as future "commitments" represents a unilateral attempt to create new future obligations. Such an approach is unreasonable, and could be viewed as a derivative of Section 301. Although the United States intends to issue reports biannually, Japan should not accept such an approach.

The EU Banana Disputes

The European Union provides African, Caribbean, and Pacific ("ACP") countries with preferential treatment regarding the imports of bananas, based on the Lomé Convention. The WTO panel and Appellate Body have both ruled that the current EU banana imports regime violates MFN and other treatment obligations. The EU announced that it would rectify the relevant measures in accordance with the advisory by 1 January 1999, but none of the EU proposals were accepted by the complaining parties (the United States, Ecuador, Guatemala, Honduras, and Mexico). In April 1999, the United States imposed a retaliatory tariff, but agreement between the U.S. and the EU, and the EU and Ecuador, in April 2001 resulted in the elimination of this tariff in July 2001.

A. History of the EU Banana Disputes

In accordance with the WTO recommendations, the EU furnished two implementation drafts, one in July 1998 and the other the following October. The complaining parties (the United States, Ecuador, Guatemala, Honduras, and Mexico), however, asserted that the proposed amendments still illegally favor the ACP countries and are, therefore, inconsistent with the WTO Agreements. In December 1998, the EU and Ecuador both requested the establishment of the original panel under Article 21.5 of the DSU.

On the other hand, the U.S. government, under strong pressure from the affected parties through Congress, decided to invoke unilateral measures under Section 301 against the EU. The United States asserted that such a unilateral measure was authorized by Article 22 of the DSU if the EU did not amend its banana import regime in compliance with the WTO Agreements. The EU asserts that any unilateral measures must be preceded by the panel's judgment according to Article 21.5 of the DSU. Furthermore, in November 1998, the EU made another request for consultation, insisting that the U.S. Section 301 related measures are inconsistent with Article 23 of the DSU's prohibition of unilateral sanctions.

In December 1998, the U.S. announced a list of sanctions based on Section 301, revealing that unilateral measures of $520 million would be imposed on handbags, Kashmir wool products and other goods imported from the EU. The U.S. and the EU agreed to refer the case to arbitration. The WTO issued the results of this arbitration on 6 April 1999, approving up to $191.4 million of the $520 million in sanctions sought by the United States. The U.S. government announced that it would finalize a list of sanctions and collect them retroactively from 3 March 1998. The 19 April DSB meeting approved the U.S. invocation of sanctions. In December 2000, the EU announced a "first-come, first-served" system that would grant banana import licenses under the tariff quota to parties preferentially exporting bananas to the EU market. It was proposed that the quota system would take effect in April 2001, with a tariff-only system to come in no later than 2006.

In April 2001, agreement was finally reached between the U.S., Ecuador, and the EU toward the resolution of what had become a very protracted dispute. One of the stipulations in the agreement was that the EU would institute a license system as of 1 July 2001 as a transitional measure, shifting to a tariff-only system as of January 2006. The license system was brought in as scheduled, leading the U.S. to lift the sanctions imposed on the EU since 1999, effective 1 July. The issue subsequently appeared again on the DSB meeting agenda, and discussion continues in the lead-up to the introduction of a tariff-only system in 2006.

B. Issues in this Case from the Viewpoint of the WTO Agreements

a) Relationship between Article 21.5 and Article 22 of the DSU

Article 22 of the DSU states that if the DSB's recommendation is not implemented within a reasonable period of time, concerned Members may request authorization from the DSB to invoke unilateral measures ("suspension of concessions"). Since the DSB uses a "reverse consensus" method for decision-making, authorization is virtually automatic unless the concerned countries express objection and refer the matter to arbitration.

In this case, the EU insisted based on Article 21.5 that the panel should judge the WTO consistency of the losing Member's implementation as a prerequisite to any unilateral measures set forth in Article 22, and requested the General Council to adopt an authoritative interpretation. In the current DSU, there is no provision indicating the relation between Article 21.5 and Article 22. However, it is generally considered that the prevailing party cannot invoke unilateral measures by independently determining that the measure taken by the losing Member to implement the DSB's recommendation is not consistent with the WTO Agreements. In such a case, the matter should be referred to the original panel as provided in Article 21.5 of the DSU. This issue was studied during the DSU review, with a new Article 21.2 included in the joint proposal on improvement of the DSU formulated by Japan. Subsequently, the EU, Japan and others submitted an amended proposal on this point in the debate on DSU revision following the Doha Ministerial Meeting.

On the other hand, if a panel's finding with regard to Article 21.5 is a strict prerequisite for unilateral measures, there would be a procedural defect of an "endless loop." That is, if the losing Member does not implement the DSB's recommendation in good faith, the matter would be referred to the original panel, thus the procedure of Article 21.5 would be repeated eternally.

b) Application of Measures by the U.S. on imports of EU products

The DSB approved U.S. retaliatory tariffs against the EU on 19 April 1999, but the United States originally expected approval earlier on 3 March, and thus required deposits in the amount of the tariff before 19 April. Consequently, this had the effect of instituting retroactive tariffs dating back to 3 March. The EU requested that a panel be convened in May 1999, alleging that this measure by the United States was in violation of Article 23 of the DSU. In July 2000, a report was distributed by the panel that virtually upheld the EU's argument, but the EU filed an appeal with the Appellate Body in September 2000 because it was still dissatisfied with the panel's ruling on some points. The Appellate Body report was distributed in December 2000, but treated the 3 March measure separately from the 19 April measure, and overturned the panel's ruling by finding that the 3 March measure no longer existed and that there was, therefore, nothing for the United States to remedy. However, the Appellate Body did uphold the finding of the panel that the 3 March measure was a unilateral measure taken by the United States without the approval of the DSB, and therefore, in contravention of Article 3.7 of the DSU. The Appellate Body avoided defining the order of precedence between Article 21 and Article 22 procedures in its ruling. But did find the panel ruling mistaken when it found that the mediator under Article 22.6 could judge the implementation of the DSB's recommendation (role under Article 21.5). Japan supports these rulings by the Appellate Body.

*Like the *Banana* case, the *Beef Hormone* case is another instance in which there have been conflicts between fulfilling the WTO dispute settlement procedures and the unilateral measures found in Section 301 of the US Trade Act. *See* Chapter 10, Standards and Certification, for a discussion of this case.

"Super 301"

See Part I Chapter 1 "The United States" of this report and Part II Chapter 14 "Unilateral Measures" of the 2002 Report.

"Special 301"

See Part I Chapter 1 "The United States" of this report and Part II Chapter 14 "Unilateral Measures" of the 2002 Report.

"Telecommunications Provisions"

See Part I Chapter 1 "The United States" of this report and Part II Chapter 14 "Unilateral Measures" of the 2002 Report.

"Provisions Involving Government Procurement: Title VII"

See Part I Chapter 1 "The United States" of this report and Part II Chapter 14 "Unilateral Measures" of the 2002 Report.

SIMILAR MEASURES OF THE EUROPEAN UNION

TRADE BARRIERS REGULATION (TBR)

The European Union has a procedure called the Trade Barriers Regulation ("TBR"), which appears to be analogous to Section 301 of the U.S. law. This measure was introduced in December 1994 by EU Council Regulation No. 3286/94 (Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization), and amended prior EU law in this area.

In principle, Article 133 (former Article 113) of the Treaty of Amsterdam had been interpreted to grant the EU authority to enact unilateral trade measures so long as the measures are within the scope of common economic policy. This interpretation led in 1984 to EU Council Regulation No. 2641/84, the "Council regulation on strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices" (hereinafter "New Commercial Policy Instrument (NCPI)"). The regulation provided a framework through which the European Union may take unilateral measures. The framework

of NCPI was taken over by the TBR to ensure better conformity with the WTO dispute settlement procedures.

Like Section 301 of the U.S. Trade Act, the TBR is intended to promote the opening of foreign markets, but it differs in some aspects. First, its scope is limited to trade practices for which international trade rules establish a right of action. Second, there is no rigid time frame between the initiation of an investigation and determination, and the EU is bound by the findings of the dispute settlement procedures. The EU regime seems more consistent with the DSU. We can hardly say that this regime itself constitutes a "unilateral measure" prohibited by the DSU. Because the philosophy of this scheme is something similar to our "rule-based criteria," it has some positive aspects. Nevertheless, it does have the possibility of violating the WTO Agreements depending on how it is put into practice, since its scope is not limited to violations of the WTO Agreements, and the organizations to which dispute cases are referred are not limited to the WTO. We believe that its practical application in the future needs to be monitored.

Description

In addition to its objective to protect European enterprises from foreign unfair trade practices, the TBR also aims to support the activities of European enterprises in foreign markets. In this system either a community industry, an individual enterprise, or an EU Member country can request the European Commission to investigate on "obstacles to trade" based on the Community's or individual enterprise's benefit.

Notes:

The major changes to the NCPI made in 1994 are described below.

(a) In the NCPI, the measures of foreign countries within the scope of petitions were defined as "illicit commercial practices." The TBR introduced the concept of "trade barriers" in its place. They are defined as "trade practices adopted or maintained by a third country in respect of which international trade rules establish a right of action." Thus its relation to international trade rules was clarified, and the scope of the procedures was expanded to cover non-violation complaints.

(b) Rules regarding services and intellectual property have been added since the WTO Agreement established trade rules for services and intellectual property as well as goods.

(c) As the TBR permits individual enterprises to make a petition based on that enterprise's own benefit, it became easier for those within the Union to avail themselves of procedures regarding trade barriers to outbound trade.

The European Commission, if requested, will start an investigation normally within 45 days, and investigate the foreign measure within five months (in complicated cases, seven months). If the foreign measure is determined to be an "obstacle to trade" after the investigation, the European Commission refers the matter to international dispute settlement procedures (mainly to the WTO dispute settlement system). If the measure is determined to be illegal in the international dispute settlement system and the defendant country does not improve the measure, the European Council will decide to take unilateral measures within 30 days based on the European Commission's proposition. Moreover, any action by the European Commission and the Council of Ministers under this regulation, including refusal to open a procedure, can be challenged in the European Court of First Instance by any interested party.

The unilateral measures under this regime include measures affecting trade with third countries, such as raising tariff rates and the imposition of quantitative restrictions. The TBR maintained the obligation to make full use of and respect for the determination of the dispute settlement procedures of international arrangements before deciding on unilateral measures. In light of the strengthened WTO dispute settlement procedures, it makes special note of the need to take measures in line with the WTO recommendations.

Cases of Application

The European Union has used the NCPI procedures several times in the past. A typical example is the Akzo case, in which the European Union disputed the application of Section 337 of the Tariff Act of 1930 in the United States. All cases, however, have resulted in mutually agreed-upon solutions; unilateral measures have never had to be taken.

Recent cases taken up by the TBR are as follows. (Asterisks indicate cases where WTO dispute settlement procedures have been invoked.)

- Argentina: Leather exports and imports,* measures related to imports of textile products and apparel*
- Brazil: Registration of the appellation d'origine "Cognac", export subsidies for planes, import of chemical products such as sorbitol
- Canada: Geographical indication for "Prosciutto di Parma", Geographical indication for wine ("Bordeaux" and "Medoc")
- Chile: Transshipment of swordfish in Chilean harbors*
- Colombia: Discriminatory value-added tax system on imported cars
- Japan: Imports of leather products* (tariff quota system and subsidies)
- Korea: Subsidies for shipbuilding industry (*see* Chapter 5: Korea), imports of cosmetics, apparel prices and refunds
- United States: Copyright Act (musical works),* Antidumping Act of 1916,* rules of origin for textile products,* import of mustard preparations

- Thailand: Copyright protection laws in relation to piracy

"EXCESSIVE" EXTRATERRITORIAL APPLICATION OF COMPETITION LAWS

The issue of "excessive" extraterritorial application of domestic law discussed here is itself not a matter of consistency with the WTO rules. However, we will examine the issue in light of excessive extraterritorial application of domestic law that is impermissible under international law. 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 domestic "consumer welfare," goes beyond the international consensus on extraterritorial application of competition laws. This refers to the matter of "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) The "Effects Doctrine" and Extraterritorial Application Regarding Legislative Jurisdiction

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 it applies to competition laws as well as other legislation.

In today's global economy, as corporate activities become more international, conducts 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.

Countries have traditionally applied their competition laws to some extent 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 have come to perceive cartels as meriting prohibition (e.g., the "OECD Council Recommendation concerning Effective Action Against 'Hard-Core' Cartels" (1998)). It has now become widespread practice among the U.S., the EU and other countries, which have been injured by international cartels, to apply domestic competition laws extraterritorially. This extraterritorial application needs to be considered in the context of deterring international cartels. This extraterritorial application is based on the "effects doctrine." The United States, the EU, and a number of other countries (especially in the OECD) have adopted this theory. The principle 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 demonstrate the legal validity of the principle. But because these academic bodies play important roles in the formation of international law, it could be said that their recognition supports the idea of an emerging international understanding.

The "Effects Doctrine"

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 tests 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.

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 the 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 in fact beginning to be applied to cases in an extraterritorial manner. Examples include the 1998 *Nordion* case, where a Canadian company which attempted to force a Japanese company into an exclusive contract was recommended to take appropriate measures due to a violation of Article 3 of the Anti-Monopoly Act, and the 1998 warning 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 abroad[1].

(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 could be applied extraterritorially only in cases in which actions taken outside a country had 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 in all probability 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 those actions restrict its exports. This policy was announced on the grounds that such actions "have an effect on exporters within U.S. territory" regardless of whether they have a "substantive effect" on the domestic market.

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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 of documents to parties located overseas, and , in certain cases, it is possible to service by public notification, so that procedures no longer raise issues of enforcement jurisdiction.

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.

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 exert a direct and substantial effect on exports from the United States.

In May 1994, the Department of Justice initiated its first case after the 1992 policy change, alleging violations of anti-trust law by the 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 the above conditions were still in effect, in spite of 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, whereby 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 state 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 that restricts its exports has an effect on its exporters. This new policy appears to go beyond the internationally recognized effects doctrine.

The Department of Justice established an "International Competition Policy Advisory Committee (ICPAC)," in November 1997 to consider the issues raised by 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, however, expected to impose restraint in the extraterritorial application of these laws to companies located overseas (foreign companies). 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 above 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.

Competition authorities have employed a number of methods to avoid this problem. Where the competition authorities in one country wish to pursue investigations in regard 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 any subsidiaries, branches or agencies of the company which have been established within their own territory. A further method 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 foreign companies 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

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[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."

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 that this was exactly the type of extraterritorial application of U.S. domestic laws that is not justified under international law, and requested the United States to proceed with caution. In the *Thermal Fax Paper* case,[3] the government of Japan also expressed the position, in *amicus curiae* briefs submitted to the Federal Circuit Court in November 1996 and to the U.S. Supreme Court in July 1997, that the Department of Justice's extraterritorial application of the criminal provisions of U.S. competition laws to conduct by foreign companies outside the U.S. is not valid under international law.

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.

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 of submitting information and other actions issued by a foreign government or court.)

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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 for 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.

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 arising from the conflict of jurisdiction caused by the extraterritorial application of domestic laws.

On the other hand, to encourage self restraint of extraterritorial application, it may be useful for the government of the country where anti-competitive conduct occurs to apply its own domestic law to protect injured foreign country's interest. Establishment of a framework for this type of "positive comity" — which is even more cooperative than "negative comity" — would be helpful in avoiding international disputes arising from extraterritorial application of domestic laws by the injured country.

The idea of positive comity can be seen as early as an OECD advisory from the 1970s, but the first time the term "positive comity" was used was in the U.S./EU agreement of 1991. In June 1999, the OECD Committee on Competition Law and Policy issued a "report on positive comity" to contribute to the policy debate on positive comity and to encourage the adoption and expansion of positive comity policies and procedures.

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 are still 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[4] 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 fully into consideration.

However, in 1993 in the *Hartford Fire* case,[5] the U.S. Supreme Court confirmed that the "effects doctrine" controls whether to apply antitrust laws extraterritorially. 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.

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4 *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.

5 *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 the competition laws have not been harmonized yet. Therefore, it is important to harmonize the competition laws themselves in conjunction with the international cooperation in the enforcement of such 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 violations of competition laws, and also stipulates international cooperation and comity with regard to enforcement.

More than ten bilateral cooperation agreements have also 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 created to provide a framework for preventing the clashes caused by extraterritorial application of competition laws and for cooperating to deal with the anti-trust activities occurring beyond the borders.[6]

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[6] 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 and others based on the exchange of information from the initial stage of investigations. In addition to mergers, the Microsoft case too was resolved based on their 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 addressing anti-competitive practices by multinational enterprises.

The first investigation to be conducted based on the positive comity provision in the above agreement concerned the discriminatory handling of computer reservation systems for plane ticketing. The Department of Justice responded to a request from American Airlines by asking the European Commission to undertake an investigation, which prompted the EC to launch a formal investigation into Air France. Agreement on remedial

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 expected to strengthen the enforcement of competition laws against anti-competitive activities with international aspects, to develop cooperation between Japan and U.S. antitrust authorities, and to deal with the problems of extraterritorial application of U.S. antitrust laws. In June 2002, Japan and the EU provisionally signed a similar agreement and the necessary steps are being made to finalize the agreement. At the same time in June 2002, Japan commenced negotiations with Canada to conclude a competition agreement. In addition, The Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership, which came into effect in November 2002, refers to cooperation between the authorities in terms of notification of enforcement activities and exchange of information with regard to telecommunications, electricity, and gas as sectors where Singapore too has competition laws in force.

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 and engage the cooperation of other countries in acquiring the necessary proof for criminal prosecutions at home. 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. are currently negotiating the conclusion of a MLAT, prior to which, pursuant to the Law for International Assistance in Investigation, Japan has also provided the United States government with investigation cooperation under certain conditions in response to requests made through diplomatic channels. For example, 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.[7]

b) Competition Law Harmonization

measures was consequently reached between the parties (between SABRE and Amadeus, the respective computer reservation systems used by Air France and American Airlines), resolving the situation in 2000.

[7] Investigation assistance in *Thermal Fax Paper* case

At the trial stage of the *Thermal Fax Paper* case (see supra, note 2 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 lays down certain procedures to be followed in determining whether to accept a cooperation request. The only requirements indicated for rejecting such a request are a lack of dual criminality or the absence of a guarantee of reciprocity. As neither of these conditions pertained to the case in question, the Japanese government saw no reason to turn down the U.S. request. In the case of the former condition, theoretical dual criminality is considered to be adequate, and given that the cartel actions addressed by this case are also a criminal offense under Japan’s Anti-Monopoly Law and Criminal Code, the Japanese government appears to have determined that such theoretical dual criminality existed.

As for competition law harmonization, it may be worth conducting multilateral discussions at the OECD, WTO, and other forums to consider the convergence of competition laws. It would also be useful to introduce, through technological assistance, appropriate competition laws to the countries that have yet to establish competition policies. Furthermore, a working party was established in July 1997 at the WTO to discuss "Trade and Competition Policy." At the Fourth Ministerial Conference (November 2001), it was agreed to begin preparatory work toward launching negotiations after the Fifth Ministerial Conference on the creation of a framework for competition policy. More specifically, the Working Group on the Interaction between Trade and Competition Policy was instructed to focus on the clarification of core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. The Working Group is, therefore, expected to advance considerations on the impact of trade measures on competition, as well as WTO rules on competition policy.

In October 2001, competition authorities from the United States, the EU and several developed countries launched the International Competition Network which will work to achieve consensus on proposals for procedural and substantive convergence in antitrust enforcement. 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 useful as an arena for broad discussion among related personnel as a means of addressing the issues in terms of their procedural and substantive aspects.

Direct Requests by Foreign Governments for Japanese Enterprises to Purchase Foreign Products

Japanese automobile manufactures issued voluntary plans in 1992 forecasting the quantity of future foreign auto part purchases. Some of the manufactures revised their plans voluntarily in March 1994, which the U.S. government declared to be insufficient. The U.S. government publicly announced that it would request Japanese automobile manufactures: (1) to revise upwards their forecasts of future purchasing value of "foreign" auto parts for production in Japan, and (2) to revise upwards forecasts of purchasing value of "U.S.-made" auto parts purchased by Japanese-affiliated companies in the United States for production in the United States.

There seems to be no problem, so long as such a request is a mere appeal to Japanese companies to purchase foreign products. However, if a foreign government threatens retaliation or brings some similar form of pressure, such as suggesting that "some retaliation may be taken if the request is not met," it deprives Japanese firms of their right to make voluntary purchasing decisions, which presents the following legal problems.

It is a basic principle of international law for a state "not to exercise its sovereign power in the territory of another state without the latter's official permission," which is derived from the notion that a state's sovereignty shall not be violated within the that state's territory. So it is naturally forbidden for foreign officials to enforce their national laws directly in a foreign country. Moreover, if the officials' act in a forcible, dictatorial, or authoritative manner toward their own nationals or citizens of another country within the territory of a foreign state, then such acts may constitute an "exercise of power" violating the above principle.