

# Exhibit 3

## E. JUDICIAL REVIEW OF TREATIES

According to the preceding discussions, the Supreme Court and lower courts can exercise judicial review on treaties on certain occasions. Since, in the judicial review process, treaties are equated with laws, the grounds for judicial review would be similar to those which are used in reviewing regular domestic laws. Generally speaking, therefore, courts examine whether provisions in a treaty violate constitutional principles. In the realm of economic regulation, the relevant constitutional principles include, *inter alia*, the freedom of business activities (Art. 22(1)) and the guarantee of private property (Art. 29). The same principles apply here as those which are applied when examining the relationship between the constitutional principles and domestic laws.

As we have already examined, there are two principles which have developed from previous Supreme Court decisions on this matter: when the domestic law in question is 'policy law type', then courts examine closely whether the law in question does not exceed the necessary minimum regulation and, if it does, courts do not hesitate to hold it as unconstitutional. On the other hand, if a law is 'policy law type', then courts in principle refrain from passing a judgment on the wisdom of the legislation and from holding it as unconstitutional, unless the law in question clearly provides an excessive control or the methods employed are unreasonable.

In treaties concerning international trade, it is possible to identify those two types of agreements. One of them is that type of international trade agreement in which measures based on socio-economic policies are incorporated and the other is where measures for public order, safety, maintenance of health, and related matters are included. If a treaty belongs to the former type, then the scope for judicial review is rather limited, whereas courts can exercise wider powers on a treaty which incorporates measures of 'policy law type'.

## 1.5 Different Regulatory Methods

## A. THE LEGAL FRAMEWORK FOR ECONOMIC PLANNING

*Programme Laws*

Although the Japanese economy is basically a market economy, there are various governmental acts which affect business activities. What legal methods are used to achieve government policy objectives? In this section, we will briefly survey such legal forms and methods. Of course, the forms of government involvement in today's economy are many and

diverse. It would be impossible to undertake a thorough survey of all the legal areas. Nor would it be very meaningful to present an encyclopaedic picture of all the laws in Japan which are used as instruments to achieve government objectives. We must be satisfied with an illustrative study of them rather than an exhaustive one.

Economic policies can be achieved through legislative or non-legislative means. They can be carried out either by legally binding means on individuals or means which are more informal and non-binding. Generally speaking, legislation is deeply involved in many aspects of economic policies—in areas such as monetary policy and fiscal policy, for example, with laws which authorize market operations. The Bank of Japan is the central agency employed to carry out government monetary policy and the Bank of Japan Law,<sup>33</sup> which established the Bank and bestowed on it the power to engage in selling and buying operations, provides the basis for this policy. Laws which exempt, reduce, or increase tax burdens on some economic activities in order to float the economy so that it can recover from recession or to restrain the economy from overheating, form the basis of government fiscal policy.

Among those laws which provide the basis of the economic policies of the government, are laws called 'the basic laws'.<sup>34</sup> They are economic policies embodied in the form of law. They require the government to formulate concrete measures in a specified area, enact the necessary laws to implement them and to carry them out. The Small and Medium Enterprises Basic Law,<sup>35</sup> the Agricultural Basic Law,<sup>36</sup> the Environmental Protection Basic Law,<sup>37</sup> and the Consumers Basic Law<sup>38</sup> are important examples of such laws. They set up the framework for specific economic, industrial, and social policies. When the government has decided that the creation of a system for promoting an economic goal (such as the promotion of small and medium enterprises) is necessary or desirable, then it establishes the basic framework for the policy in the form of a law. This type of law may be termed 'framework law'.

'Framework laws' are not binding on individuals as such and are not enforceable through the courts. Moreover, private individuals cannot use provisions incorporated in such laws to bring actions against the government for not putting the mandates of the laws into practice. Yet such laws are more than a mere declaration of policies. They require the government to implement the programme contained in them. It is not clear what

<sup>33</sup> Nihon Ginkō Hō, Law 17, 1942.

<sup>34</sup> In Japanese it is called 'kihon hō'.

<sup>35</sup> Chūshokigyō Kihon Hō, Law 154, 1963.

<sup>36</sup> Nogyō Kihon Hō, Law 127, 1962.

<sup>37</sup> Kōgai Taisaku Kihon Hō, Law 132, 1967.

<sup>38</sup> Shōhisha Hogo Kihon Hō, Law 78, 1967.

the legal consequences might be for non-performance of the requirements. Non-performance would probably not create legal liability on the part of the government. However, since the contents of the policies are contained in the form of law, they are regarded as being of a higher ranking than mere policy statements. If the government neglected the mandate of such a law for a long time, it would certainly incur serious political opprobrium.

Since such laws provide 'legal programmes' for the government to put into practice, they are sometimes called 'programme laws'. In the pages that follow, we will limit ourselves to examining the basic laws which have bearings on business activities, namely, the Small and Medium Enterprises Basic Law and the Agricultural Basic Law.

#### *The Small and Medium Enterprises Basic Law*

This is one of the most important programme laws and we will briefly review the contents of it. Enacted in 1963, it provides the framework of governmental measures to promote the interests of small and medium enterprises. Article 1 of the law states that it is designed:

to provide remedies to economic and social limitations surrounding small and medium enterprises, to promote their self-help efforts, and to improve their productivity and terms of trade with the view to rectifying the differences in the productivity among enterprises as well as contributing to the raising of the economic and social positions of employees of small and medium enterprises.

In order to accomplish this basic objective, the law provides: (1) a definition of small and medium enterprises, (2) government policies, and (3) legal measures. 'Small or medium enterprise' in this definition is an entity whose employees number 300 or fewer with capital of 100 million yen or less. Governmental policies towards small and medium enterprises are stipulated in Article 3. Included in the governmental policies are the modernization of facilities, the promotion of research and development, and the introduction of modern management techniques and related matters. Article 5 of the law states: 'The government should take necessary legal and financial measures in order to accomplish the measures provided for in Article 3.' From this structure, we can see that this law does not provide the details of governmental measures as such. It provides the basic legal framework within which the government is required to take the necessary steps.

The government has enacted more than twenty laws to promote and protect small and medium enterprises within the framework of this law. Details of those laws and their actual enforcement are touched upon in a latter chapter.<sup>39</sup> Such major laws fall into the following categories:

<sup>39</sup> See Chap. 4, 4.5, below.

1. Laws designed to provide financial assistance through loans at a preferential rate and providing guarantees for loans.
2. Laws which authorize enterprises to organize themselves in the forms of co-operatives and associations thereby creating economies of scale for operations and providing a countervailing power to larger enterprises when they are engaged in transactions with them.
3. Laws designed to facilitate research and development by authorizing research associations and providing financial assistance.
4. Laws providing for adjustment assistance in the form of, *inter alia*, funds when enterprises decide to shift from the business area in which they are engaged to a new area.
5. Laws protecting enterprises from abusive conduct by large enterprises when they supply parts and components to them as subcontractors.
6. Laws securing business areas by restricting the entry of large enterprises (such as the Large-Scale Retail Stores Law which restricts the entry of supermarkets into local markets).

#### *The Agricultural Basic Law*

The Agricultural Basic Law was enacted in 1961 and it formulates the basic agricultural policies which the government should pursue. In its Preamble, it recognized that Japanese agriculture is in difficulties since there is a wide gap between the agricultural and the industrial sectors in terms of productivity and the standard of living of workers in favour of the industrial sectors, and that the work-force is shifting from agriculture to industry. It states that the objectives of the law are to promote agriculture through modernization and rationalization.

This law is divided into: (1) the general rules (Arts. 1-7), (2) agricultural production (Arts. 8-10), (3) pricing and distribution of agricultural products (Arts. 11-14), and (4) the improvement of the structure of agriculture (Arts. 15-22).

Article 1 states that the government should adopt measures to rectify the disadvantages which agriculture has incurred from natural, economic, and social limitations, to promote productivity in agriculture with a view to correcting the differences between the agricultural and industrial sectors in terms of productivity, and to raise the income of workers in agriculture. In order to achieve this purpose, Article 2 stipulates some specific objectives such as: (1) the selective expansion of agricultural production, (2) the increase of productivity by way of the development of land and water, and related matters, (3) the increase of the scale of farm operations, (4) the improvement of the distribution of agricultural products, (5) the stabilization of prices of agricultural products and the maintenance of the income of those engaged in agriculture, (6) the rationalization of the distribution of agricultural tools and the stabiliza-

tion of their prices, (7) the education of those who will be engaged in agriculture, and (8) the promotion of the welfare of those engaged in agriculture by means of improving transportation, sanitation, and working environments.

Article 6 obligates the government annually to report to the National Diet the trends in agriculture and measures taken by the government concerning agriculture.

Under Articles 8 and 9, the government must make a forecast of the demand and supply with regard to major agricultural products, announce it, and take the necessary steps to increase, on a selective basis, agricultural productivity, and total agricultural production.

The price stabilization programme is stipulated in Article 11 which states that the government should take the necessary measures to stabilize the prices of agricultural products. Also the government should encourage improvement programmes engaged in by agricultural co-operatives. Important among the measures stipulated is import restriction. Article 13 of the law states that, whenever the prices of agricultural products are conspicuously depressed by the import of competing products and the production of such products may be hampered due to the decline of the price, the government should restrain the import of such agricultural products by raising tariffs or by imposing quantitative restrictions.

As seen above, the Agricultural Basic Law only sets out the general outline of the agricultural policies which the government should pursue. There are several dozen laws which put them into effect. It is probably not very useful to enumerate all those laws, so we will only note a few of the most important ones.

The Agricultural Land Law<sup>40</sup> establishes rules with regard to the ownership of agricultural land. The basic purpose of this law is to establish the system in which each farmer owns his/her own land and cultivates it. Recently, however, the regulation of this law has been relaxed a little to allow the leasing of agricultural land so that farmers can engage in agricultural activities on large-scale farms. The Agricultural Co-operative Law<sup>41</sup> provides for co-operatives and associations in which farmers organize themselves and engage in joint purchasing, selling, research, and other related matters. The Agricultural Central Fund Law<sup>42</sup> establishes a governmental financial institution which issues loans and other financial assistance to farmers at preferential interest rates. The Foodstuffs Control Law<sup>43</sup> provides for the purchase and selling of rice and the prohibition of

<sup>40</sup> Nochi Hō, Law 229, 1952.

<sup>41</sup> Nōgyō Kyōdō Kumiai Hō, Law 132, 1947.

<sup>42</sup> Nōrin Chūo Kinko Hō, Law 42, 1923.

<sup>43</sup> Shokuryō Kanri Hō, Law 40, 1942.

rice imports. There are similar laws in the areas of fisheries and the fishing industry.

#### B. MASTER PLAN BY THE GOVERNMENT

From time to time the government sets up a general framework for a specific industrial sector in which private enterprises are urged to formulate their own business plans. In such cases, the government acts as the formulator of a master plan within which private enterprises make specific business plans. Some examples are given below.

The Petroleum Business Law<sup>44</sup> is one such example, and we will briefly look at this law and its operation. The Petroleum Business Law, which was enacted in 1962, is the basis of the petroleum policy of the Ministry of International Trade and Industry (the MITI). One of the basic objectives of the petroleum policy is to import crude oil from abroad and refine it in Japan. Another objective is to ensure the 'stable' supply of petroleum products.

Under the Petroleum Business Law, the Minister of the MITI is required to formulate 'the stable supply plan' for petroleum products and implement it. The Minister formulates a programme for the supply of petroleum products for the next five years based on a forecast of demand and supply of the products. The aim is to avoid over-production and consequent depression of prices. To achieve this objective, it is necessary to control production in some way.

Since it is private enterprises which import crude oil and produce petroleum products, government tools forcing private enterprises to go along with government policies are required. For this purpose, the law provides that the Minister of the MITI has the power to license the building of refining facilities. Any enterprise which intends to establish a new refinery must obtain a licence from the MITI before it can do so. The MITI utilizes this licensing power to control the increase of production facilities in private enterprises. Another provision enforces enterprises engaged in the production of petroleum products to report to the MITI their plans for production.

The law also gives the MITI the power to recommend to private enterprises that they change or modify their production plans, thus ensuring that the industry reduces total production when over-production is anticipated.

A combination of the above is used effectively to control production. Enterprises file their production plans, and, if the MITI finds that their plans, if carried out, would cause over-production, it invokes the power

<sup>44</sup> Sekiyugyō Hō, Law 128, 1962.

to recommend modification or change of production plans. The fact that the MITI possesses the power to license the building of refineries is a strong weapon for the MITI to exert an influence over the industry.

What is interesting in the above regime is that an informal, rather than a formal and legalistic, means is used to implement the policy. In actuality, however, the MITI has never utilized this recommendation power. The MITI has always used more informal means called 'administrative guidance' to achieve its policy objectives. A detailed examination will be made of administrative guidance in a later section. Here it suffices to state that the MITI has avoided using *formalized* administrative guidance but utilizes an informal administrative guidance to achieve the policy goals.

This law does not authorize private enterprises to agree among themselves jointly to determine the quantity of petroleum products to be produced. In fact, however, such agreements or 'cartels' have been made and have been held as a violation of the Anti-monopoly Law. This will be discussed in a later chapter.<sup>45</sup>

Another similar type of government programme was found in the law concerning structurally depressed industries. This law was in force from 1983 to 1988 and then abolished. It does not exist any more, but it provides a good example of how the government formulates a master plan and private enterprises come up with their own plans within this master plan. In the scheme established by the Structurally Depressed Industries Law, the MITI designated some structurally depressed industries as 'specific industries' and formulated a reorganization plan for each of them in which it indicated the general direction of how to cut back excess facility and to direct the whole industry to more promising business areas. Private enterprises in a designated industry were urged to establish a business co-operation programme in which they agreed on mergers and acquisitions, joint buying and selling and joint venture in production, research and development, as well as related matters.

This business co-operation plan had to be approved by the MITI. The MITI consulted with the Fair Trade Commission when approving any plan to ensure that it would not run counter to provisions of the Anti-monopoly Law. Enterprises which were engaged in a business co-operation plan approved by the MITI were provided with a guarantee by a fund established by the government with respect to the repayment of borrowings from banks.

In this scheme, the role of the government was to set up a general master plan within which private enterprises made a concrete business co-operation plan for their own betterment. In such situations, the acts of

<sup>45</sup> See Chap. 2, 2.7, below.



private enterprises were private acts as well as being instrumental to the implementation of a governmental purpose.

### C. UTILIZATION OF PRIVATE ASSOCIATIONS FOR GOVERNMENTAL POLICIES

Often the government utilizes private initiatives and private associations for the purpose of achieving governmental policy objectives. In areas such as the promotion of small and medium enterprises, sometimes the law authorizes the government to announce a framework within which private enterprises are expected to form associations for the improvement of management, production, or for some other purposes. Such associations are of a private nature in the sense that they are designed to promote the interests of the members. The activities of such associations are usually for the benefit of the members, and, in this sense, they are privately motivated. However, such associations are used by the government to achieve government purposes and, therefore, their activities are not entirely private since they are originally planned by the government and encouraged by the government. Indeed private associations in such situations are a policy instrument for the government. In this way, there is a mixture of government policies and private efforts.

Private associations are often utilized by the government as an important policy instrument for exercising 'industrial policy'. We will review the legal aspects of industrial policy in a later chapter and so detailed examination of this subject will be reserved for that chapter. However, we will briefly note some of the important laws which authorize such private associations.

Articles 667-88 of the Civil Code recognize the right of individuals and corporations to enter into a private association or to form a co-operative. However, an association or co-operative formed under the Civil Code is seldom used as a policy instrument. Beside the Civil Code, there are a number of laws which authorize the formation of associations or co-operatives in specified areas. Associations and co-operatives formed under those laws are private combinations since membership is not compulsory and entry and withdrawal are generally made on the free will of individuals or corporations. However, they are more than purely private combinations since the authorization laws usually specify the purposes and limitations for their activities and often government subsidies are given to such associations.

Private associations are recognized especially in the area of promoting and protecting small and medium enterprises. In this area, the Small and

Medium Enterprises Organizations Law<sup>46</sup> and the Small and Medium Enterprises Co-operatives Law,<sup>47</sup> *inter alia*, provide for associations and organizations for small and medium enterprises. They are designed to organize them into larger business units so as to achieve economies of scale in operations and to acquire countervailing bargaining-powers *vis-à-vis* large enterprises.

In foreign trade, the Export and Import Transactions Law<sup>48</sup> authorizes exporters to enter into an export agreement and also an import agreement. The law also authorizes the formation of export and import associations. Such agreements and associations are expected to restrain 'excessive competition' in exports which may cause trade frictions with the importing countries. Import agreements and associations, which are much less utilized, are designed to allow importers to combine themselves to form countervailing powers to exporters in the country of export when the export trade in the country of export is monopolized by the government or private enterprises in the form of an export cartel.

Also in areas such as agriculture, fisheries, insurance, and research and development, similar associations and co-operatives are allowed. Some of them will be dealt with later.

### C. LICENSING OF BUSINESS ACTIVITIES

#### *Two Types of Licensing*

Business activities are subject to licensing by the government for a variety of reasons. Some are subject to licensing because of the public nature of the business or the need for supervision. Such licensing powers are vested by law in the national government (usually in ministries) or in the local authorities (such as prefectural governments and their subdivisions).

Traditionally, according to the theory of administrative law, the licensing powers and the laws which authorize the licensing system have been classified into two categories.<sup>49</sup> It has been maintained that, in some business areas which are characterized as highly public in nature, the power to carry out business activities is originally vested in the hands of the government and that private enterprises have no freedom to engage in such business activities. The reason for this monopoly is that the absolute need to provide goods or services to secure the minimum level of

<sup>46</sup> Chūshō Kigyō Dantai Hō, Law 185, 1957.

<sup>47</sup> Chūshō Kigyōtōh Kyōdokumiai Hō, Law 181, 1949.

<sup>48</sup> Yushutsunyū Torihiki Hō, Law 299, 1952.

<sup>49</sup> See Kisugi, *Keizaikatsudō To Hō (Economic Activities and Law)* (Tokyo, 1987), 34 *et seq.*

civilized life regardless of profitability, the large requirement for capital investment, the limited demand, and related matters necessitate that the execution of the businesses be entrusted to the government. It has been argued that the nature of the businesses involved is such that the economic performance would be uncertain or inferior if private enterprises were allowed freely to enter into the areas without any government control.

The supply of electricity, gas, and water, and the provision of telecommunications are regarded as belonging to this category. In those areas, however, the government can delegate by licence under law the power to carry out the business to private enterprises. In those areas, the government grants by licence to private enterprises the special 'privilege' to engage in business, and the licence given in such cases is a 'privilege licence'.

The traditional theory holds that there are some other business areas in which private enterprises are originally vested with the right to engage in business but that the government imposes prohibitions on private enterprises to do business for the sake of maintaining public order, safety, public health, and related matters, and, when it becomes clear that an enterprise intending to enter one of these businesses is qualified to do so, and that no harm will be caused to society, the government gives permission to the enterprise to engage in the business. In those business areas, the right to engage in business by private enterprises is temporarily suspended by the prohibition under law and, when the government certifies that an enterprise is qualified to engage in the business, a licence given by the government restores the original right of the enterprise.

For example, in the restaurant business, private enterprises basically enjoy the freedom to engage in business. However, in order to maintain public health and safety, there are requirements in the relevant regulatory law which enterprises intending to do business must meet.<sup>50</sup> Therefore, the law controlling this business prohibits or suspends the right of a private enterprise to engage in business until a licence is given. A licence must be obtained from the relevant authority when an enterprise begins business in this area and the licence confirms that the enterprise is well qualified to operate a restaurant and cause no danger to the public.

In this category, the prohibition by law imposed on business activities and permission granted to enterprises to engage in those activities by licence under law are designed to maintain order in society and this type of regulation is an exercise of police power. A licence of this type may thus be called a 'police power licence'.

<sup>50</sup> e.g. Art. 14(1) of *Shokuhin Eisei Hō* (The Food Hygiene Law, Law 303, 1950) prohibits anyone from selling specified foods and additives unless tested and permitted by the Minister of Health and Welfare or the Governor of the prefectural, as the case may be.

*Licence Granting Privilege to Engage in Business*

Examples of business activities in which the power to carry out business is given to private enterprises by a privilege licence are: the supply of water, the postal service, the supply of electricity, public transportation, tele-communications, and some others. In fact, some of the services which belong to this category are supplied by the government itself. The supply of water is one example and the postal service is another. However, since it is not practicable for the government to engage in all such business activities, it delegates the power to operate some businesses to private enterprises by law. The laws which authorize such businesses provide strict requirements which the private enterprises so authorized must meet in terms of capital requirements, conditions for entry into those business areas, withdrawal from the business concerned, and other terms.

The theory holds that, in those business areas, although private enterprises are delegated the power to engage in business, the power is originally vested in the government and it is a privilege (not a right) for private enterprises to enter into those areas. Often-cited examples are business activities granted under the Electricity Power Business Law,<sup>51</sup> the Gas Business Law,<sup>52</sup> the Railroad Operations Law,<sup>53</sup> the Road Transportation Law,<sup>54</sup> and others.

There are several features which are common to all such laws. New entry of enterprises is allowed only when a licence is given by the ministry in charge, and the ministry in charge is regarded as having 'free discretion' to decide whether to grant a licence to a new entrant or not. Often there is a provision in the authorization law that, in granting a licence to a new entrant, the ministry in charge must take into consideration the supply and demand conditions in the relevant market, and, when it seems to the ministry that supply is sufficient or there is a threat of over-supply, it should not grant a licence.

Recently, however, this supply and demand provision has been criticized by commentators who say that it has unduly restricted new entries and that thereby competition in the relevant market has been restrained.<sup>55</sup> There is a slight sign of change in this respect. For example, in the Freight Trucking Business Law,<sup>56</sup> which was enacted in 1990 and replaced that part of the Road Transportation Law which dealt with trucking, there is no provision which states that the Ministry of Transportation

<sup>51</sup> *Denki Jigyō Hō*, Law 170, 1964.

<sup>52</sup> *Gasu Jigyō Hō*, Law 51, 1954.

<sup>53</sup> *Tetsudō Jigyō Hō*, Law 92, 1986.

<sup>54</sup> *Dōro Unsō Hō*, Law 183, 1951.

<sup>55</sup> See, in general, *Kisugi*, n. 49, above.

<sup>56</sup> *Kamotsu Jidōsha Unsōjigyo Hō*, Law 83, 1989.

should take into consideration supply and demand conditions in the trucking business when considering whether to grant a licence to a new entrant. This law abolished a prior-examination system with regard to licensing based on the supply and demand conditions and introduced a post-examination system in which the Ministry of Transportation examines the supply and demand conditions in a particular area after the licence is given. If the Ministry of Transportation finds that there is over-supply of services in a particular area, the enterprises in the area can be restrained from increasing the capacity for services. This is a somewhat more relaxed regulation.

In those areas covered by the laws, a market is not necessarily monopolized by an enterprise. It is legally possible to grant a plural number of licences to operate in one area. However, there often is a monopolistic situation in those areas due to the restriction of the entry of new enterprises by the ministry in charge. Here again there is a trend for change. In the telecommunications area, the business was once monopolized by the Nippon Telephone and Telegram Company. However, now there are several competing companies in the long-distance telephone business.

Under these laws, there is generally a restriction on withdrawal from the market. This means that a withdrawal is subject to approval by the ministry in charge. Also there is usually price regulation of some kind. The most common type of such regulation is that the price charged by enterprises must be licensed by the ministry in charge, as in the Electric Power Business Law. The licensing of price by the ministry is usually based on the principle of fair return; namely that the ministry gives the licence to a price which recovers the cost and yields a reasonable profit.

Recently, in some laws, there is a system of price reporting instead of price licensing. In the Freight Trucking Business Law to which a reference has been made earlier, enterprises engaged in the business are required to file their tariffs with the Ministry of Transportation. Although the Ministry of Transportation has the power to order a change in the tariff filed by an enterprise when it judges that the tariff in question would cause serious problems in the business, enterprises are free to set their own prices, at least in the initial period of their operations.

Often such laws stipulate that there is the duty to supply on the part of licensed enterprises. Therefore, the enterprises cannot refuse to supply services to those who request them. For example, in the Electric Power Business Law, the Gas Business Law, the Road Transportation Law, and others, there is a provision which states that the licensed enterprises must supply services when requested. In this sense, therefore, there is no freedom of contract or freedom to refuse to contract as far as licensed enterprises are concerned.

### *Police Power Licence*

As noted before, there are some business areas in which enterprises are basically free to engage. However, even in those areas, an enterprise which intends to do business must obtain a licence from the government. The purpose of the requirement that an enterprise intending to do business in the area must obtain a licence is to ensure that the enterprise is fully qualified and equipped to do business and to observe the conditions necessary for maintaining public safety, health standards, good morals, and the like. In those laws which provide this licensing system, there are usually legal requirements which enterprises must meet if a licence is to be given.

Many kinds of businesses fall into this category. Examples include, *inter alia*, restaurants, hotels, bars and night clubs, cleaning stores, sports and amusement centres, pawn shops, banking, insurance.

In these areas, the government must give a licence to an enterprise which intends to do business as long as the enterprise meets the requirements since essentially there is the freedom of an enterprise to do business. The licensing law cannot infringe this fundamental freedom. All it can do is to exercise the power to make sure that the applying enterprise satisfies the legal requirements. If the applicant satisfies these requirements, the government is bound to give a licence.

The theory in administrative law states that the government's discretion in those areas is 'bound discretion' or 'restricted discretion', since the government is not free to decide whether to grant a licence or not but is obligated to grant a licence as long as the legal requirements incorporated in those laws are satisfied.

### *The New Theory*

In recent decades, the traditional classification of the regulatory laws into the two types described above has come under criticism from commentators.<sup>57</sup> They maintain that the difference between 'free discretion' and 'restricted discretion' is at best a matter of degree and not that of kind. Even in the areas in which the government enjoys 'free discretion' to grant a licence to a business or not, the government is bound by the language of the relevant law and so does not have complete freedom as to whether to grant a licence or not. On the other hand, in the areas in which the government's discretion is restricted, the provisions of the law which set forth the licensing requirements may be couched in broad terms and, through interpretation, the government may, in fact, possess some discretion. Commentators argue that the dualism which the

<sup>57</sup> See, in general, Kisugi, n. 44, above.

traditional theory maintains is unrealistic in the light of the present economic regulations.

Commentators also maintain that nowadays there are many regulatory powers of the government which do not belong to either of these types. For example, the regulation under the Petroleum Business Law (to which reference has been made) does not incorporate a licence for the privilege to do business. Nor does it incorporate the power of the government to grant a licence for the maintenance of public order, good morals, and health standards.

Likewise, under the Large-Scale Retail Stores Law,<sup>58</sup> which provides for the restriction of new entry of large-scale retail stores (like supermarkets), the power of the government cannot be classified as either one or the other. In those new areas, the purpose of the regulation is to achieve policy objectives or to reconcile conflicting interests.

It is true that laws which belong to this middle ground are increasing tremendously in number and the traditional dualism is quickly becoming obsolete. Perhaps it is better to examine each piece of legislation on its own merits rather than to apply abstract criteria indiscriminately.

#### D. FORMS OF GOVERNMENT ORDERS AND REGULATIONS

Under some laws, the government is authorized to issue an order that commands the party to whom it is addressed to refrain from doing something (such as refraining from using materials which would cause environmental pollution) or to perform something (such as paying administrative fines). Government orders issued by the Executive Branch are generally called 'administrative dispositions' whose enforceability is usually backed up by the criminal penalty which will be imposed on the violating party.

In the areas of economic regulation, laws often state the general principles and delegate the authority to enforce them to administrative agencies through Cabinet decrees and ministerial orders. The Cabinet enacts Cabinet decrees, and administrative agencies (often ministries) are empowered to promulgate the regulations and issue orders (administrative dispositions) to enforce the content of the law and the Cabinet decrees. Often ministries announce guidelines in which the ministry shows its own interpretation of the law and regulation.

For example, under the Foreign Exchange and Foreign Trade Control Law,<sup>59</sup> Cabinet decrees entitled 'the Foreign Exchange Control Decree'<sup>60</sup>

<sup>58</sup> Daikibo Kouri Tenpo Hō, Law 109, 1973.

<sup>59</sup> Gaikoku Kawase Oyobi Gaikoku Bōeki Kanri Hō, Law 228, 1949.

<sup>60</sup> Gaikoku Kawase Kanre Rei, Decree 260, 1980.

and 'the Foreign Investment Control Decree'<sup>61</sup> authorize the Ministry of Finance to issue regulations in areas such as foreign exchange control and foreign investment control. The MOF has issued many ministerial orders which implement the details of the law and decrees.

In some laws, the administering authority is empowered to issue 'recommendations' prior to resorting to an order. For example, in the Large-Scale Retail Stores Law, the MITI or the prefectural government, as the case may be, is authorized to issue a recommendation to a large store which intends to make a new entry into a local market to put off the time of entry or to reduce the floor space of the store if it judges that new store would endanger the business of existing small shops in that local market, before resorting to an order commanding the large store to abide by it. As will be touched on in more detail, the Fair Trade Commission (FTC) can issue a recommendation to the party which is suspected of a violation of the Anti-monopoly Law advising the party to cease and desist from the conduct in question. If the party accepts the recommendation, then the FTC can enter a decision without a hearing or trial. If not, usually an administrative proceeding is initiated.

Other laws provide for a different way of enforcement. In the Law to Provide for Emergency Measures to Stabilize National Life<sup>62</sup> which was enacted in the Oil Crisis to cope with sky-rocketing prices, it is provided that the government can announce 'the standard price' for a designated commodity. This is the maximum price above which no enterprise is supposed to sell. However, any enterprise which sells the designated commodity above this standard price is not punished by criminal penalty. The only remedy provided is the publication by the government of the name of the enterprise in violation. This is a device to control the conduct of enterprises through bad publicity.

#### E. RECOURSE AGAINST THE GOVERNMENT

What kind of remedy is available when the person to whom an administrative disposition is directed wishes to challenge it? We will touch briefly on the general laws on this matter. Under the Administrative Appeals Law,<sup>63</sup> a person to whom an administrative disposition is directed may appeal to a higher office in the administrative agency which has issued the disposition and request a review of it. For example, if the Customs House issued an order to block the entry of a commodity in to Japan by reason of a violation of a law, the importer could bring an appeal to the higher office in the MOF to which the Customs House belongs.

<sup>61</sup> Tainai Chokusetsutōshi Nikansuru Seirei, Decree 261, 1980.

<sup>62</sup> Kokumin Seikatsu Antei Kinkyūsochi Hō, Law 121, 1973.

<sup>63</sup> Gyōsei Fufuku Shinsa Hō, Law 160, 1962.



The Administrative Cases Litigation Law<sup>64</sup> provides for the right of an individual to bring a suit in court against the government when he/she feels that a disposition by the administrative agency has adversely affected his/her interests. Under this law, the requirement for standing to sue must be satisfied. This means that the person who brings a suit against the government must show that his/her legal interests are adversely affected by the disposition in question. Court decisions have interpreted this standing narrowly and generally the right to sue the government is limited to the person to whom the administrative disposition in question has been addressed. Although there may be a third person whose interests may have been adversely affected by an administrative disposition directed to a person, the standing to sue is not likely to be granted to that third person.

A famous decision which has some bearings on this issue is the *Juice Representation* case.<sup>65</sup> In this case, the FTC approved of a fair competition code entered into among producers of juice. Under the Law Prohibiting Unreasonable Premiums and Unreasonable Representation,<sup>66</sup> the FTC is empowered to approve of a fair competition code concluded among enterprises which contains rules regulating the contents of representations of the products in question<sup>67</sup> or the amount of premium which is offered with sale of the products. In this case, producers of juice concluded a fair competition code which stated that they would use the representation which merely said 'coloured by synthetic additives' to represent juice which did not contain any fruit juice rather than saying 'without fruit juice'. This code was approved by the FTC. The Housewives Union and also the President of the Union initiated proceedings in the FTC arguing that the approval (an administrative disposition) was likely to mislead consumers and should be withdrawn.

The case was tried first in the FTC. The FTC denied the claim of the Union and the President on the ground that they did not have the standing to bring the case before the FTC since the law in question was not designed to protect each individual consumer, and the administrative disposition in question (the approval of the representation) did not deprive each consumer of any legal benefit which the law should provide. This decision of the FTC was approved in the Tokyo High Court and also in the Supreme Court.

The *Novo* case,<sup>67</sup> in which the issue was whether or not a foreign party to an international contract could bring an action against the FTC when the FTC issued an order commanding the domestic party to the contract

<sup>64</sup> Gyōsei Jiken Soshō Hō, Law 139, 1962.

<sup>65</sup> Decision of the Supreme Court, 14 Mar. 1978, *Minshū*, 32/2 (1978), 211 *et seq.*

<sup>66</sup> Futō Keihinri Oyobi Futō Hyōji Bōshi Hō, Law 134, 1962.

<sup>67</sup> Decision of the Supreme Court, 28 Nov. 1975, *Minshū*, 29/10 (1975), 1592 *et seq.*

to cancel it on the ground of its illegality under the Anti-monopoly Law, is another important example of how courts would deal with this issue. The Supreme Court ruled that the foreign party did not have the standing to sue the FTC.

In principle, all suits must be brought in regular courts. There is no general administrative court which exists side by side with regular judicial courts. However, in some specific areas there are specialized administrative tribunals. A good example is the Tax Appeals Board to which claims against tax decisions made by the Tax Offices may be appealed. Judicial review is available after the decision of the Board has been rendered.

The State Redress Law<sup>68</sup> authorizes a private individual to bring a tort claim against the government when his/her property has been unreasonably damaged by a tort act of a government official in the course of exercising his/her official power. A remedy is available when the conduct which has caused the damage was done in the course of the exercise of official power. If the conduct was of a purely private nature, then the suit should be directed to the official as an individual. Also, in order for the plaintiff to recover, the illegality of the conduct in question whether in the form of a violation of the Constitution, treaties, laws and regulations, or *ultra vires* must be established, the intent or negligence on the part of the government official must be proved, and also the causal relationship between the illegal conduct of the official and the damage must be established.

In the *COCOM* case,<sup>69</sup> to which reference has already been made, the Tokyo District Court denied a relief to the plaintiffs on the ground that there had been no intention or negligence on the part of the MITI officials who had decided to disapprove the exportation in question even though the court held that the disapproval of the export in question under the Foreign Exchange and Foreign Trade Control Law was unconstitutional for the reason that the law did not authorize the control of export for the purpose of international political or strategic objectives.

## 1.6 Administrative Guidance

### A. DEFINITION OF ADMINISTRATIVE GUIDANCE

No explanation of the Japanese governmental process is complete without some discussions of administrative guidance.<sup>70</sup> Although informal ways of

<sup>68</sup> Kokka Baishō Hō, Law 125, 1947.

<sup>69</sup> Decision of the Tokyo District Court, 8 July 1969, *Gyōsai Reishū*, 207 (1969), 84 *et seq.*

<sup>70</sup> For writings in the English language, see the following: Young, 'Administrative Guidance in the Courts; A Case Study in Doctrinal Adaptation', *Law in Japan*, 17 (1984),

carrying out government policies such as administrative guidance are not necessarily unique to Japan, the degree of pervasiveness and the importance of administrative guidance in the Japanese governmental process is probably unique to Japan. In Japan, economic regulations must ultimately be based on legislation as the source of their authority and legitimacy. However, government agencies in Japan often choose not to use laws directly to accomplish their policy goals but to utilize the more informal process of persuasion when they wish to control the conduct of private enterprises. This informal process of persuasion is often called 'administrative guidance'.

Administrative guidance is vague and flexible by its own nature, and, therefore, it is not easy to give a precise definition of administrative guidance. However, a high-ranking official of the Cabinet Legislation Bureau, when asked in the National Diet for the definition of administrative guidance, provided the following:<sup>71</sup>

[Administrative guidance] is not legal compulsion restricting the rights of individuals and imposing obligations on citizens. It is a request or guidance on the part of the government within the limit of the task and administrative responsibility of each agency as provided for in the establishment laws, asking for a specific action or inaction for the purpose of achieving some administrative objective through cooperation on the part of the parties who are the object of the administration.

The above statement is regarded as an official definition of administrative guidance by the Japanese government. Although this definition is abstract, hard to understand, and susceptible of different interpretations, it does contain several salient features in administrative guidance. (1) Compliance is voluntary. Administrative guidance is not a legal order with penalties for disobedience and, therefore, the party to whom it is addressed has the *legal* freedom of non-compliance. (2) Administrative guidance is a *de facto*, rather than *de jure*, directive issued by government officials and, even if an administrative guidance is issued, it does not make it automatically a legal order. (3) Administrative guidance should, however, be distinguished from the personal conduct of government officials issuing it. It is often an expression of government policy of some kind. (4) In a broad sense, administrative guidance is a form of government regulation which imposes some kinds of rules of conduct on private individuals or enterprises. (5) Even though administrative guidance is informal and has no legally binding power, it is different from a request

120 *et seq.*; Smith, 'Prices and Petroleum in Japan: 1973-1974—A Study of Administrative Guidance', *ibid.* 10 (1977), 81 *et seq.*; Yamanouchi, 'Administrative Guidance and the Rule of Law', *ibid.* 7 (1974), 22 *et seq.*; Narita, 'Administrative Guidance', *ibid.* 2 (1974), 45 *et seq.*; Yoemans, 'Administrative Guidance', *ibid.* 19 (1986), 125 *et seq.*

<sup>71</sup> Cited in Matsushita and Schoenbaum, n. 7, above, p. 32.

made by an individual to another individual. The relationship between the party requesting (the government) and the party to whom it is addressed is often not equal. In many cases, the government has more bargaining power, resources, and influence than the private individual or enterprise which has been made the object of administrative guidance. (6) In exercising administrative guidance to impose a rule of conduct on private enterprises, the government often represents the consensus of the industry in which the rule of conduct should be enforced. (7) Generally speaking, no precise procedure is required nor is a delineated scope defined. Often administrative guidance is made orally rather than in document form. (8) Administrative guidance is often used before a law is invoked in a situation when the government can invoke the law to impose discipline on the conduct in question. Used in this way, administrative guidance may be a preliminary stage of invoking a law.

#### B. TYPES OF ADMINISTRATIVE GUIDANCE

Administrative guidance can be classified into different types, among which the following three types seem to be most common: (1) promotional administrative guidance, (2) regulatory administrative guidance, and (3) adjudicatory or conciliatory administrative guidance.

##### *Promotional Administrative Guidance*

Often government agencies provide advice to enterprises in order to promote their business activities. In agriculture, the offices of the Ministry of Agriculture and of the prefectural governments operate governmental research institutes and disseminate agricultural technology produced by those institutes to farmers and, when necessary, officials give advice to farmers and assist them to improve production, storage, and processing of agricultural products.

Also, in small and medium enterprise areas, government agencies often render assistance to small enterprises to try to improve their production, management, transportation, research and development, and other matters. Often financial assistance through government financial institutions like the Medium and Small Enterprises Financial Bank, the Commerce and Industries Central Finance Bank, and the People's Bank is given. They issue loans at interest rates much lower than the market rates. Often government officials engage in advising the management personnel of small and medium enterprises, who have borrowed money from those institutions, how to improve their production and other business operations.

This type of administrative guidance can be called 'promotional'

administrative guidance whose main function is to promote or protect enterprises or persons who are recipients of such advice.

### *Regulatory Administrative Guidance*

Often government agencies use administrative guidance to regulate the conduct of enterprises and persons, and, when used in this way, it serves as a substitute for an order under law. There are many examples of administrative guidance of this type, particularly in the area of foreign trade, i.e., export and import controls. However, we will deal with examples of regulatory administrative guidance in export and import controls in a later chapter.<sup>72</sup> Here we will limit ourselves to explaining regulatory administrative guidance in domestic regulation.

A well-known example is that of the *Sumitomo Metal* case<sup>73</sup> in 1965, in which the MITI used administrative guidance to cut back production of steel. In 1965, there was an economic recession and there was a general agreement among the producers of steel to cut back production in order to avoid a further decline in prices. The MITI applied administrative guidance to the steel industry to reduce the amount of steel to a certain level. Most of the companies in the industry complied with this advice and agreed to reduce production. However, the Sumitomo Metal Company was dissatisfied with the quota of production which had been allocated to it and denied compliance.

In those days, the MITI had the power to allocate foreign currency to importers and, without such allocation it was impossible for the company to import the necessary coal and iron ore for production. The company stated that it would bring a legal action against the MITI if the MITI suspended its allocation of foreign currency.

The dispute was finally settled by a compromise between the company and the MITI to the effect that the company would comply with the MITI's request, with some reservations.

Another example is that of the *Price Control* case in 1973.<sup>74</sup> In the year of the Oil Crisis prices in Japan sky-rocketed. The Cabinet decided to establish the price-reporting system in which each ministry would issue directives to enterprises producing products in its charge to report when they intended to raise prices. The ministries often pressured the enterprises to refrain from raising their prices or to reduce the level of price rises. Sometimes ministries set a maximum price above which enterprises could not raise their prices.

<sup>72</sup> See Chap. 3, 3.2, below.

<sup>73</sup> Okumiya, 'The Role of the Administrative Branch in Trade: Government Order and Administrative Guidance Concerning Trade Problems', in Schoenbaum, Matsushita, and Dallmyer (eds.), n. 5, above, pp. 917-121.

<sup>74</sup> Cited in Yamanouchi, *Gyoseishido (Administrative Guidance)* (Tokyo, 1977), 37-47.

The government could have invoked the price control decree<sup>75</sup> and fixed the price by law. However, the government decided not to use the price control order because of some questions about the interpretation of the order, and chose instead to use administrative guidance to deal with price hikes.

When used in this way, administrative guidance imposes rules of conduct on enterprises. As long as it is guidance, there is no compulsory power to enforce it in the event of non-compliance. However, government agencies try to utilize different types of persuasion techniques to secure compliance by enterprises.

There are several cases in which a regulatory administrative guidance caused the recipient enterprises to engage in collusive arrangements or cartels. There was an antitrust problem in those cases which will be touched on in a later chapter.

### *Adjudicatory Administrative Guidance*

Government agencies sometimes use administrative guidance to help private enterprises settle disputes among themselves. Of course, legal disputes among enterprises must ultimately be settled by the courts. However, there are disputes which are not suitable for court proceedings and also there is a general desire among enterprises and among the public to avoid confrontation in the courts. For these and other reasons, there is a role for government agencies which belong to the Executive Branch to engage in dispute settlements.

A dispute between enterprises may have some impact on industrial policy matters too, and, in such a situation, the involvement of administrative agencies in mediating the dispute is probably justified as part of industrial policy.

Perhaps the best examples of the role of government agencies in dispute settlement are found in the solving of conflicts between large and small enterprises. As discussed in a later chapter, small and medium enterprises are given various types of protection and promotion due to their sheer number and their importance in the Japanese economy. However, because of a difference in scale of operations and in competitiveness between large and small enterprises, there are many conflicts and disputes between them when they are engaged in competition and also when they are in such transactional relationships as assemblers (like car manufacturers) and suppliers of parts and components (like subcontractors).

In the retail industry, there have been many disputes between supermarkets and small shopkeepers when a supermarket attempts to enter a

<sup>75</sup> Bukka Tosei Rei, Decree 118, 1946. Under emergency circumstances, the government is authorized to establish the maximum price of a commodity.

local market. Small shopkeepers in the locality fear that their business will be seriously damaged when a larger supermarket enters the market. Similar disputes have arisen in the manufacturing and wholesale industries. For example, in some parts of the food industry such as bean curds and bean sprouts, the undertaking industry, and some light manufacturing industries which have been traditionally regarded as the areas for small and medium enterprises, disputes arise when large enterprises intend new entries.

There are several laws which are designed to deal with such problems. In the retail industry, the Large-Scale Retail Stores Law<sup>76</sup> provides the mechanism for dispute settlements at the initiative of the government whereas, in the manufacturing and wholesale industries, it is the Medium and Small Business Areas Adjustment Law.<sup>77</sup> Generally, in those laws, there is the provision for the government (in the form of the MITI and the prefectural governments) to issue recommendations to parties in dispute to come to terms. However, usually neither the MITI nor prefectural governments utilize this formal power for dispute settlement but engage in a more 'informal' persuasion. For example, the MITI or prefectural governments would informally urge a large supermarket intending to make a new entry into a local market to delay opening a new store or to reduce the floor space so as to mitigate its impact on the existing business of small retail stores in the locality.

In the above situations, the role of the government is that of an informal mediator, advising and suggesting to the parties in the controversy ways of resolving a dispute. This has proved to be effective and many disputes which the parties would never have solved themselves have been resolved without utilizing court proceedings.

### C. LEGAL BASIS FOR ADMINISTRATIVE GUIDANCE

As explained earlier, administrative guidance is not a legal action and has no legally binding effect on the party to whom it is addressed. However, administrative guidance is sometimes based on a provision in a law. Sometimes it is authorized by a specific clause in a law and sometimes no such legal basis is found. As noted earlier, even though a law authorizes a government agency to engage in administrative guidance in the form of 'recommendation' and 'warning', the government agency often chooses not to utilize this power but engages in *de facto* advice to the recipient party.

<sup>76</sup> Daikibo Kouri Tenpo Hō, Law 109, 1973.

<sup>77</sup> Chūsho Kigyō Jigyōbunya Chōsei Hō, Law 52, 1982.

*Administrative Guidance without a Specific Statutory Authorization*

Sometimes government agencies engage in administrative guidance without any specific statutory authorization. The *Sumitomo Metal* case, to which reference has been made, is one such case. In such cases, there is no wording in law which authorizes government agencies to render administrative guidance. Government agencies, especially the MITI, have emphasized that administrative guidance is allowed by 'establishment law' even though there is no specific provision in the authorization law. For example, the Law to Establish the MITI gives general powers and responsibilities to the MITI to supervise specified industries. The law, however, contains no wording which unequivocally sets out the power to give administrative guidance.

Even though administrative guidance is not based on a specific provision in a law authorizing the agency, it creates little problem when it is promotional administrative guidance. In such situations, the recipients of the guidance have little reason to complain since the nature of such guidance is to give benefit to the recipient by promoting its business, providing financial assistance, and so on.

However, if regulatory administrative guidance is utilized without any specific authorization by law, then the validity of it may be questionable since one inevitable aspect of regulatory administrative guidance is to impose a restriction on conduct or prohibition of conduct on the receiving party and, therefore, to infringe upon the rights and freedom of individuals.

*Administrative Guidance based on Specific Statutory Language*

There are laws which contain a provision that a government agency can issue administrative guidance. The terms used in those laws to describe administrative guidance vary from one law to another. Terms such as 'recommendation' (*kankoku*), 'warning' (*keikoku*), are used. If administrative guidance is issued on the basis of one of these laws, the administrative guidance is a legal act even though there is no power to enforce it by penalty.

The Marine Transportation Law<sup>78</sup> authorizes the Ministry of Transportation to issue a recommendation to enterprises engaged in the ocean freight business to take the necessary measures when it deems that cutthroat competition exists and the sound development of the industry is likely to be impaired. Such measures include agreements among enterprises to limit competition. As we have seen already, in the Petroleum Business Law, there is a provision which states that the MITI can establish the standard price at which the petroleum companies are expected to sell

<sup>78</sup> Art. 32, *Kaijō Unsō Hō*, Law 121, 1956.



petroleum products. The standard price has no binding power over the companies and is, therefore, a recommendation by the government.

As we have touched upon already, the National Life Stabilization Emergency Measures Law authorizes the government in a state of emergency to set the standard price for commodities designated by the government. Here again, the standard price has no binding effect on enterprises which sell the commodities. Non-compliance incurs only the publication of the names of the non-complying parties. In the Architects Law,<sup>79</sup> the Ministry of Construction is authorized to announce a standard for the fees which architects charge to their clients and recommend it to them.

#### *Administrative Guidance Combined with Other Promotional or Regulatory Measures*

Sometimes, administrative guidance is not based on a provision of law but is combined with other measures to ensure its effectiveness. The Medium and Small Business Modernization Promotion Law<sup>80</sup> and the Agricultural Products Price Stabilization Law,<sup>81</sup> which respectively authorize the government agency in charge to give advice to enterprises or farmers with regard to improving their management and operations, provide for financial assistance combined with such advice.

More importantly, however, regulatory guidance may be combined with some legal or extra-legal measures to ensure their effectiveness. The *Sumitomo Metal* case<sup>82</sup> is a case in point. As we have seen, the administrative guidance of the MITI was backed by the power of the MITI to allocate foreign currency to importers. There are many cases in which the MITI advised exporters to engage in 'voluntary export restraint' by way of administrative guidance with the compulsory power incorporated in law as the background. References will be made to those cases later.<sup>83</sup>

In the Large-Scale Retail Stores Law, there is a provision which states that the agency in charge (the MITI or the prefectural government, as the case may be) can issue an order to a large supermarket entering the local market to delay the opening of the store or to reduce the floor space after the agency has issued advice to the same effect and the advice has not been complied with. There is a similar provision in the Medium and Small Business Areas Adjustment Law. In such cases, the agency is required to use administrative guidance in the form of 'advice' before invoking compulsion by law.

<sup>79</sup> Art. 25, Kenchikushi Hō, Law 202, 1950.

<sup>80</sup> Chūsho Kigyō Kindaika Sokushin Hō, Law 64, 1963.

<sup>81</sup> Nōsanbutsu Kakaku Antei Hō, Law 225, 1953.

<sup>82</sup> See Okumiya, n. 73, above, pp. 106-8.

<sup>83</sup> See Chap. 3, 3.3, below.

As noted earlier, the agency, in enforcing those laws, often does not utilize even the provision authorizing it to engage in administrative guidance but exercises a *de facto* administrative guidance. However, even in such a situation, the fact that the government can ultimately resort to the provision in law which would achieve the same purpose if the *de facto* guidance is not respected enhances the effectiveness of the administrative guidance since the agency can utilize it as a tacit threat to make the party comply.

#### D. EFFECTIVENESS OF ADMINISTRATIVE GUIDANCE

Although the effectiveness of administrative guidance has somewhat declined compared with some decades ago, it is still an important policy tool for the Japanese government. Our enquiry turns to the reasons why guidance is effective. The effectiveness of administrative guidance depends on the types of administrative guidance and the circumstances under which it is made. However, as a general proposition, we can state the following.

When the government engages in administrative guidance, it often reflects the consensus in the industry to which the guidance is applied. An example is, again, the *Sumitomo Metal* case. Administrative guidance is never effective if the industry which is the object of the guidance opposes it as a whole. An important task for the government officials who exercise administrative guidance is to engage in effective persuasion and to create a spirit of co-operation among the recipients of the guidance. Often ex-officials of the government are in key positions in companies or trade associations of the industry to which the guidance is applied and they may play a crucial role in it.

There is a strong desire among the business community to avoid confrontation with the government even if the business community feels that the administrative agency has acted without legal authority in exercising *de facto* control by way of administrative guidance. This somewhat 'submissive attitude' of business communities towards the government may be a factor which makes administrative guidance effective.

When administrative guidance is supported by public opinion as in the cases of price control during the intensive inflation in the Oil Crisis, government agencies often publicize the fact that guidance has not been complied with in the event of non-compliance. In such a case, the effect of publicity is utilized as a technique of control. To give one example, consumer centres attached to local governments receive complaints from consumers regarding defects in commodities, and, when they think those complaints are not frivolous, they advise the manufacturers or vendors of such defective products to replace them with new goods or else take

other appropriate measures to remedy the situation. This advice is not compulsory. However, if this advice is not respected, this is publicized. This has a considerable effect, and, whenever such advice is given, companies usually comply with it without questioning the legal authority behind it.

In view of this, some laws authorize recommendations to be issued by the administrative agencies and provide for publication as the sanction for non-compliance with such recommendations. The Law against Hoarding and Unreasonable Speculation,<sup>84</sup> the Land Utilization Planning Law,<sup>85</sup> and the National Life Stabilization Emergency Measures Law,<sup>86</sup> *inter alia*, all provide for advice to be given by the agencies in charge and for publication of the fact of non-compliance.

The wide range of powers possessed by some agencies may account for the effectiveness of administrative guidance. Although the legal powers of the MITI have declined in recent decades, it still has powers in areas such as international trade, safety and other standards, pollution control, mining and petroleum, electricity supply, gas supply, and industrial properties. The MOF has the power, *inter alia*, to control banking, securities, and insurance as well as to impose taxes. An enterprise with a wide range of operations (which is a feature of enterprises today) is likely to be affected by one or other of those powers possessed by the agency which has the supervisory authority over its activities. The enterprise which has been made the subject of administrative guidance takes into consideration possible consequences at present or in the future of ignoring the administrative guidance and generally judges that to comply with the guidance is a wise business policy.

In foreign trade, enterprises often need assistance from the government when faced with trade conflicts with other nations. For example, if Japanese enterprises are challenged in the United States on account of a violation of United States antitrust laws, they need the support of the Japanese government when they argue in a United States court that the activities in question have been imposed upon them by the government.<sup>87</sup> Also, if Japanese enterprises are unduly discriminated against in a foreign country, the enterprises may wish to complain to the Japanese government and request appropriate action (such as a complaint to the GATT) on the part of the government. Therefore, it is a good policy for enterprises to keep a good relationship with the government and avoid any

<sup>84</sup> Kaishime Urioshimi Bōshi Hō, Law 48, 1973.

<sup>85</sup> Kokudo Riyō Keikaku Hō, Law 92, 1974.

<sup>86</sup> Kokumin Seikatsu Antei Kinkyō Sochi Hō, Law 121, 1973.

<sup>87</sup> The case in point in this context is: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 US 574 (1986).

confrontation with it. This type of consideration may be another reason why administrative guidance has worked relatively well in Japan.

#### E. EVALUATION OF ADMINISTRATIVE GUIDANCE

In spite of what has been said above, it must be emphasized that administrative guidance is by no means sacrosanct. It is often effective only if it is based on a consensus within the industry as regards the reasonableness of the guidance. In other cases it is effective only if it is backed up by law. Indeed, the effectiveness of administrative guidance is, in a sense, proportionate to the powerfulness of the agency exercising it. In the post-war period when the economy had been badly shattered by the war, enterprises needed help and assistance from the government, and, under such circumstances, administrative guidance could be very effective. However, now that many enterprises have acquired economic power and independence, they may not need assistance from the government any more. In this situation, the effectiveness of administrative guidance tends to decline. It is probably accurate to say that the golden age of administrative guidance has passed or, at least, is passing.

Administrative guidance can be of great value both to the government and to citizens and enterprises, and there is nothing inherently sinister about it. Administrative guidance, generally speaking, is more flexible than the formal enforcement of law. In emergencies like the Oil Crisis of 1973, economic regulation by law may be too inflexible; it may take too long before a law is invoked, and the scope of a law may be too limited to cope with changing situations. In contrast to the enforcement of law, administrative guidance is much more flexible, and the response of the government to the situation is much more prompt. This should be regarded as the advantage of administrative guidance. Usually negotiations and persuasion are used before administrative guidance is invoked, and economic regulation is accomplished in a more amicable way than unilateral imposition of a legal order by the government which may create tension between the government and business.

However, the advantages of administrative guidance, viewed from a different angle, are also its shortcomings. The flexibility of administrative guidance may mean that its exercise is not circumscribed by any limits. Since, as explained before, administrative guidance can put irresistible pressure upon the addressee, the lack of a clearly defined area within which it can operate may lead to an arbitrary and capricious exercise of *de facto* governmental power and to infringement of individual rights.

Another shortcoming of administrative guidance is a lack of transparency of the process through which it is executed. In enforcement of a law, the procedures are usually provided for in the law, and everyone can see the

process of enforcement. In administrative guidance, however, there is no clearly defined procedure, and even if a compromise is reached between the government and the enterprise which has received the administrative guidance, it may adversely affect the interests of outsiders, and yet there is no standard procedure through which they can raise their objections. Also the general public is deprived of the opportunity of knowing what is under consideration by the government and of participating in the formulation of policy.

In the Structural Impediments Initiative (the SII), a bilateral trade negotiation between the United States government and the Japanese government concluded in 1990, the Japanese government promised to improve the process of administrative guidance by using written documents instead of just oral presentations.<sup>88</sup> The idea involved here is to increase the transparency of the process. Perhaps a law should be enacted which generally provides for the process which the government must utilize when using administrative guidance and in which the rights of third parties to know the contents of administrative guidance and make their views known to the party receiving the guidance and to the government too are fixed.

#### F. REMEDY AGAINST ADMINISTRATIVE GUIDANCE

By definition, administrative guidance is an informal act of the government and has no binding power on the person receiving it. As such, compliance with administrative guidance is voluntary. As long as administrative guidance remains in such a pure form and non-compliance incurs no legal or *de facto* disadvantage, there is no legal remedy to it. Nor is it necessary to provide a remedy since non-compliance incurs no consequence. As we have seen already, however, administrative guidance is often a substitute for the enforcement of law. Sometimes the receiving party has little choice but to comply with it. If used in this way, it has almost the same effect as an order by law. In such a circumstance, it would be unjust and unreasonable to deny the party to whom it has been applied any relief even though the party has been seriously disadvantaged by it.

Under the Administrative Cases Litigation Law and the State Redress Law, the party whose interest has been adversely affected by the act of a government official can respectively seek for a cancellation of the act in question or for the recovery of damages caused by it. Under both laws, there must be an action by a state official in the exercise of the official

<sup>88</sup> On the SII, see Matsushita, 'The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation', *Michigan Journal of International Law*, 12/2 (1991), 346 *et seq.*

power of the government which has caused a hardship on the party to whom it has been applied before the party can seek for a cancellation of the action or for the recovery of damages. An administrative guidance is by definition advice of a government official issuing it compliance to which is voluntary for the party receiving it and, to that extent, a legal action in the above laws is not possible, since it is not regarded as an action in the exercise of official power of the government.

However, in exceptional situations, administrative guidance can be regarded as an act of an official in the course of exercising the official power of the government and, therefore, a remedy is available. A case in point is the decision in the *Model Gun* case decided by the Tokyo District Court.<sup>89</sup> Involved in this case was the following set of facts.

A person intended to import a model gun (a toy gun) and sell it. He imported and sold it. The police decided that the model gun in question was a weapon whose importation and sale was prohibited by the Law to Control Weapons.<sup>90</sup> The police could have invoked this law and prohibited the importation and sale of the gun. However, the police chose not to invoke an order by this law but utilized an administrative guidance requesting the party not to import and sell the gun. The police sent the records of the case to the Public Prosecutor's Office and the Prosecutor's Office decided to indict the person for illegal importation and sale of a weapon.

The case was tried by the Tokyo District Court. The court held the defendant not guilty since, after a series of experiments, the court had come to the conclusion that the model gun in question was not powerful enough to be classified as a weapon and, therefore, the importation and sale of the gun did not amount to an importation and sale of a weapon.

Meanwhile the person (the defendant in the criminal trial) went bankrupt and brought an action against the government (the police) on the basis of the State Redress Law. The plaintiff argued that the business of the plaintiff was wrongfully damaged by the administrative guidance which had been based on a wrong assumption that the model gun was a weapon.

The Tokyo District Court held that the plaintiff could not recover damages since the plaintiff must prove the malicious intent or negligence on the part of the government official whose conduct had been alleged to cause the damage and there was no proof in this case that the act of the government official (the police officer) was done with malicious intent or negligence.

<sup>89</sup> 23 Aug. 1976, *Kakyū Minshū*, 27 (1976), 493 *et seq.* See, on this case, Matsushita, 'The Legal Framework of Trade and Investment in Japan', *Harvard International Law Journal*, 27, Special Issue (1987), 361 *et seq.*

<sup>90</sup> *Jūhō Tōkenrui Shoji Torishimari Hō*, Law 6, 1958.

The Tokyo District Court, however, noted in a *dictum* that the administrative guidance in this case was an act in the course of exercising the official power of the government; that is to say, the administrative guidance in this case was a substitute of an official act in the form of legal order. This means that the court characterized the administrative guidance in the case in question as an official act of the government subject to the State Redress Law even if the guidance involved in this case was not an order by law at least as far as the form of it was concerned.

Judging from this case, we can conclude that a remedy in the form of recovery of damage caused by an administrative guidance is available under some specific circumstances. However, this is a limitation to such a remedy. First, in the *Model Gun* case, the administrative guidance was used in lieu of invoking a law when the administrative agency could have invoked the law to prohibit it. In this type of situation, there is a high degree of likelihood that there would be a legal action by the agency if the administrative guidance was not complied with.

As we have seen already, however, administrative guidance is often exercised without any law which would accomplish the same purpose. Often administrative guidance is merely informal advice from the agency. It may indeed have a *de facto* coercive impact on the party to whom it is applied. For example, a subsidy to a person may be withheld if the guidance is rejected by that person. This prospect of withholding a subsidy may be a strong incentive for the party to whom the guidance is applied to obey it. If a causal linkage is established between the rejection of the guidance and the withholding of the subsidy, it is possible for the person to bring a legal action utilizing the rationale stated by the Tokyo District Court in the *Model Gun* case under the State Redress Law that the guidance in question is an exercise of the official power of the government. Often, however, it is hard (or impossible) to establish that linkage and, as long as no such linkage is established, the administrative guidance is nothing but an informal admonition by the government no matter how strong a pressure it may have exerted in actuality, and is not subject to a legal remedy.

Furthermore, administrative guidance is often issued orally. For example, a government official merely announces the content of administrative guidance in a private meeting. In such a case, it is hard to prove that there was an administrative guidance.

Recently there have been growing criticisms against excessive use of administrative guidance. As we have touched upon already, one such example is the Structural Impediments Initiative negotiated between the United States government and the Japanese government. The United States government raised an objection to administrative guidance to the

effect that, because of its informality, it lacks transparency, and may lead to an infringement of the due process of law. The Japanese government promised to put administrative guidance in writing, to secure transparency.

In sum, administrative guidance is still a useful tool for the government to use for the variety of reasons mentioned above. However, it is perhaps necessary to bring in a little more 'legalism' in the process. To put it in writing in principle is an improvement in this respect since it increases transparency. It is also necessary to enact a law which establishes some rules for administrative guidance in general, such as the opportunity of third parties to be heard and the remedy which would be available. In Japan, there is no such law as the Administrative Procedure Act in the United States which provides general rules for actions by the United States government. Perhaps there is need for a law of this nature in which some rules on administrative guidance can be incorporated, such as those which require the government agency to publish administrative guidance to guarantee opportunities for third parties to participate in the process in some ways, including presenting their views on it and also to provide some procedure for remedy when the party which has been made the subject of administrative guidance is unreasonably disadvantaged.



# Exhibit 3 - 1

**Re: ANA Antitrust Issues**

I am Mitsuo Matsushita residing in Tokyo, Japan. My major areas of teaching, research and practice are antitrust laws and international economic laws. After earning a Ph.D degree (political science and public administration) from Tulane University and a D. Jur. Degree (law) from Tokyo University, I went on to teach as a full-professor at Sophia University, Tokyo University and Seikei University. I was awarded the title of Professor Emeritus from Tokyo University (1994) and from Seikei University (2010). I taught at a number of foreign universities as a visiting professor including, *inter alia*, Harvard Law School (1977-78), Monash University (Australia, 1980), British Columbia University (Canada, 1981), Columbia Law School (1987-88), Michigan Law School (1990, 91 and 92), College of Europe (Belgium, 1992, 93 and 94), University of Hawaii (1994) and Zurich University (Switzerland, 2004). Currently I am a visiting professor of the Institute of Advanced Studies, the United Nations University.

I have published a number of books and articles in the areas of antitrust laws and international economic laws. A bibliography of my writings both in Japanese and English is attached.

I am a member of the Tokyo Bar (Daiichi Tokyo Bengoshi Kai) and act as a special counsel to the Law Offices of Nagashima Ohno & Tsunematsu, one of the largest international law firms in Japan. I acted as an expert witness in U.S. antitrust cases including *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125 (E.D.Pa., 1980); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *U.S. v. C. Itoh & Co. et al*, 1982-83 Trade Cases at 65,010.

I was one of the founding members of the Appellate Body of the World Trade Organization from 1995 to 2000. During this period, I participated in the resolution of more than 15 trade disputes among WTO member states. In 2006-2007, I acted as the Chairman of the Panel of the World Trade Organization that resolved an international trade dispute between the European Community and Brazil concerning import prohibitions of re-treaded tires, imposed by Brazil for the protection of its environment.

I was a member of a number of councils attached to the Japanese Government, advising government agencies in formulating legislative and executive policies, including the Industrial Structure Council (attached to the Ministry of International Trade and Industry, MITI), the Industrial Property Council (MITI), the Customs and Tariff Council (the Ministry of Finance), the Telecommunications Council (the Ministry of Telecommunications and Post), and various advisory boards attached to the Japan Fair Trade Commission (JFTC). Currently I am a temporary member of the Industrial Structure Council and the Chairman of the Special Committee on Special Customs and Tariffs attached to the Ministry of Economics, Trade and Industry (METI, formerly MITI).

I have been asked by U.S. attorneys representing All Nippon Airways (ANA) in antitrust matters to address certain aspects of the Japanese Antimonopoly Law and the Japanese Aviation Law in the context of international aviation treaties to which Japan is a party. My legal opinion is set out in the following memorandum.

### Memorandum

1. The status of international aviation agreements in the Japanese legal order

In order to examine the relationship of government-to-government international aviation agreements and the domestic regulatory system pertaining to aviation in Japan, it is essential to start from a review of Article 98:2 of the Japanese Constitution ("The Constitution"). Article 98:2 of the Constitution declares: "Treaties and the established rules of international law shall be faithfully observed." Generally this constitutional provision is regarded as declaring the supremacy of treaties over domestic laws and regulations when such laws and regulations may be contrary to the treaty terms. Although precedents are not quite unanimous in interpreting Article 98:2 of the Constitution, it is established in the case law jurisprudence that, in the event of conflict between a treaty and a domestic law, the treaty prevails over the domestic law.

In the Jewel Smuggling Case (1961),<sup>1</sup> a foreigner brought into the country jewels by declaring that these were his personal effects. However, in fact, he brought them into the country for sale. When he was indicted for a violation of the Customs Law, he raised a defense that he should not be punished because Article 8:3 of the GATT (The General Agreement on Tariffs and Trade) stated that Contracting Parties shall not punish a minor offense of customs law. Although the Kobe District Court rejected this defense for the reason that the violation of the Customs Law in this instance was not a minor offense, the Court referred to Article 98:2 of the Constitution and stated: "the principle of faithful observance of treaties...is understood to proclaim superiority of treaties [over domestic laws]."

In the Prison Law Case (1996),<sup>2</sup> a person detained in prison who claimed mistreatment by officers of the prison requested the right to counsel to attend an interview. When the Director General of the prison denied this request, both he and his counsel brought a tort claim against the state under the State Indemnity Law and invoked the International Human Rights Convention as requiring Contracting Parties to grant to prisoners the right to counsel. The Tokushima District Court cited Article 98:2 of the Constitution and stated: "Treaties are

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<sup>1</sup> Decision of Kobe District Court, 30 May 1961, *Kakyo Keishu* (Lower Court Criminal Cases Reporter), 3/5-6 (1961).

<sup>2</sup> Decision of Tokushima District Court, 15 March 1996, *Hanrei Jiho* (Court Cases Reporter) 1596/115.

accepted as part of the domestic legal order when they are ratified and proclaimed. ... They are applicable to domestic situations without any intermediary domestic legislation and are in a superior position over general domestic laws". The Court struck down the provisions of the Prison Law as contrary to the Convention.

From the above, it is established that international treaties are incorporated into the Japanese legal order and domestic laws, and prevail over any contrary domestic regulations.

## 2. The Japanese legal framework for aviation

The basic law in Japan for aviation is the Aviation Law (Kōkū Hō, Law 231, 1952, as amended). The purpose of this law is to establish the legal framework for civil aviation in Japan. The legislative intent of this law is declared in Article 1 which states: "The purpose of this law is to develop the aviation business and to promote the public welfare by providing means of securing the safety of aviation and removing obstacles to operation of aircrafts on the basis of provisions of international treaties on aviation and standards, formulae, and procedures adopted as annexes of such treaties." It is to be noted that international treaties and their annexes are mentioned as the basis of the Japanese aviation policy.

Article 105:1 of the Aviation Law requires that airlines engaged in aviation must file tariffs to the Minister of Land, Infrastructure and Transport (hereafter referred to as "the MLIT"). Article 105:2 states that the MLIT can order changes of tariffs if the MLIT judges that the tariffs filed under Article 105:1 are (a) discriminatory to some passengers or cargo shippers, (b) gravely unreasonable in light of the economic and social circumstances and cause serious difficulties to passengers and cargo shippers in using services or (c) tend to cause unfair competition with other airlines operators. With respect to airline operators who engage in international aviation, a special rule is provided for in Article 105:3, i.e., airlines operators who engage in international aviation business must file tariffs with and *obtain approval* of the MLIT. Under Article 105:4, the MLIT must approve tariffs that do not contravene the provisions (a), (b) or (c), and that meet the requirements of international aviation agreements and other international obligations.

Articles 100, 107 and 108 of the Aviation Law provide respectively the powers of the MLIT to (1) license business, (2) approve initiation of operation schedules and (3) approve change in operation schedules. To operate an aviation business, airlines must obtain a license from the MLIT and the same applies when initiating operation schedules and changing them. The MLIT has the power to allocate take off and landing slots to each airline and to control related operational matters.

Article 110 of the Aviation Law provides for the exemption from the application of the Antimonopoly Law of international aviation agreements entered into by domestic and foreign airlines made under the authority of Article 111, Paragraph 1 of the Law, i.e., agreements among Japanese national airlines and other airlines on tariffs and other terms of transportation with respect to transportation between an airport in Japan and an airport abroad and between airports abroad entered into for the purpose of promoting services to the public, provided that the MLIT will not approve agreements that amount to unfair business practices or undue impediments to users due to a substantial restraint of competition in a particular field of trade.

Article 111:1 of the Aviation Law provides that aviation companies must file an agreement as provided in Article 110 of the Law with the MLIT and the MLIT shall not approve such agreement unless it is satisfied that such agreement does not cause undue disadvantage to users, is not unduly discriminatory, does not unduly restrain entry into or withdrawal from such agreement and does not exceed the necessary minimum restrictions.

Another important article is Article 112 of the Aviation Law, which vests with the MLIT the power to issue an order in certain situations. If the MLIT judges that the safety of transportation, convenience of users, or other public interest is impaired, the MLIT can order airlines to (1) change business or transportation plans, (2) change operations and safety rules, or (3) change tariffs (limited to international tariffs). (Paragraphs (4)-(6) are omitted). Importantly Article 112 authorizes the MLIT to order airlines *to change international tariffs* if this is necessary to secure the safety of transportation, convenience of users or other public interests. The Law does not specify details of these items. Presumably, tariffs that are, in the MLIT's judgment, set too high are included within the scope of these items to protect the interests of passengers and cargo shippers. Tariffs set too low (dumping) may cause instability of airfares and disrupt the regularity of operations. Therefore, the MLIT is afforded the power to regulate international air services.

Japan is a party to many multilateral and bilateral international aviation agreements including the Chicago Convention (1944, ratified by Japan in 1953) and bilateral air services agreements with the United States and European and Asian countries. Among those agreements especially important for the purpose of this memorandum is "The Civil Air Transport Agreement between the United States of America and Japan," entered into in 1952 (hereafter referred to as "the ASA"), and made fully effective, by an exchange of diplomatic Notes, in 1953.

Article 73:3 of the Constitution states that the Cabinet is empowered to conclude treaties with foreign nations with prior approval, or if circumstances do not permit, subsequent approval of the National Diet. International agreements duly made through this process are treaties and enjoy the privilege of Article 98:2 of the Constitution which has been discussed above. All of the above mentioned

aviation agreements entered into by participating states including Japan are treaties in the sense of Article 73:3 of the Constitution and, therefore, are given priority over domestic laws and regulations.

The ASA entered into between the United States and Japan is a ratified treaty in the sense of Article 73:3 of the Constitution and enjoys the privilege of Article 98:2 thereof. As stated above, one of the essential elements of the ASA between the United States and Japan is a direct control of rates and tariffs by the government and the stabilization of transport services market between the countries. Under Article 98:2 of the Constitution, the Japanese Government is responsible for implementing the requirements of the ASA between the United States and Japan.

The ASA draws on the Chicago Convention by stating in Article 1 that: "Each Contracting Party agrees that the principles and provisions of the Convention on International Civil Aviation, signed at Chicago on December 7, 1944, applicable to the international navigation of aircraft shall, to the extent to which they are applicable to the air services provided for in the present Agreement, be observed by both parties." Article 13 of the ASA is the key provision, which provides for a direct intervention of aviation agencies both in the United States and Japan to control tariffs. Article 13 states:

"(A) The determination of rates in accordance with the following paragraphs shall be made at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit, and the rates charged by any other airlines, as well as the characteristics of each service.

(B) The rates to be charged by the airlines of either Contracting Party between points in the territory of the United States and points in the territory of Japan referred to in the attached Schedule shall, consistent with the provisions of the present Agreement, be subject to the approval of the aeronautical authorities of the Contracting Parties, who shall act in accordance with their obligations under the present Agreement within the limits of their legal powers.

(C) Any rate proposed by the airline or airlines of either Contracting Party shall be filed with the aeronautical authorities of both Contracting Parties at least thirty (30) days before the proposed date of introduction; provided that this period of thirty (30) days may be reduced in particular cases if so agreed by the aeronautical authorities of both Contracting Parties."

Article 13 of the ASA between the United States and Japan is unique among the air services agreements between Japan and major nations. The air services agreements that Japan has entered into with major European and Asian

nations generally have required that, where possible, tariffs should be agreed to on a multilateral basis at IATA conferences; where not possible, they should be agreed bilaterally with the other nation's designated airlines; and only in case of dispute should be subject to resolution by the Aeronautical Authorities themselves. The ASA between the United States and Japan, by contrast, provides for the direct intervention into, and regulation of, by the Aeronautical Authorities of both countries, the the tariff's of each country's Designated National Airlines. Hence, the Designated National Airlines providing air services between the United States and Japan are under the duty to file tariffs with both U.S. and Japanese authorities, and, for each tariff, to obtain the approval of *both* sets of Authorities. This has been referred to as the "double" or "dual" approval system. Rather than open and free competition with respect to tariffs, the basic principle of the ASA between the United States and Japan is that of *dirigisme*.

To sum up, the Aviation Law provides that Japan's aviation policy is based on international treaties in aviation, that tariffs must be filed with and approved by the MLIT, that agreements among airlines with regard to tariffs and other terms of transportation thus approved are exempted from the application of the Antimonopoly Law and that the MLIT is empowered to intervene, regulate, and issue orders if the MLIT judges that such action is necessary to maintain stability in international aviation. Japan, as has the United States, has also extended formal antitrust immunity to agreements reached under auspices of the International Air Transport Association (IATA), which was formed in the year after the Chicago Convention but which predates any of Japan's ASAs.

IATA, an organization composed of the world's international airlines, was formed in 1945. Beginning with first bilateral air service agreement, the Bermuda Agreement negotiated between the United States and the United Kingdom, air service agreements between the world's nations recognized IATA as a forum in which airlines would agree upon international fares. The 1952 U.S.-Japan ASA also accepted the principle of multilateral airline agreement on fares. Article 13(D) expressly notes that the United States had approved the IATA conference mechanism for reaching agreements on international air fares. Therefore, rates adopted by IATA would be used for air travel between the United States and Japan, subject to approval by the aviation authorities of each country, as noted above. Disputes between the authorities regarding airlines' tariffs were to be subject to mediation through the International Civil Aviation Organization. Under the operation of the aviation laws of each country, approval of the IATA mechanism by each country's aviation authority confers immunity from each country's competition law. While the IATA tariff conference mechanism has been the subject of concern by the JFTC, the IATA conference mechanism continues to have antitrust immunity in the United States and Japan for air travel between the two countries.

Fuel surcharges are a category of tariff related to but outside IATA. These surcharges became subject to unique oversight in Japan after the United States, in

October, 2004, reversed its previous refusal to allow the separate filing of surcharge tariffs. Japan followed suit in 2005, devising a unique application for the approval of fuel surcharges by its designated national airlines, JAL and ANA. Japan began requiring fuel adjustments, for flights both from and to Japan, to be made by means of special application to MLIT, in early 2005. Until mid-2006, the corresponding filings under Article 111 of the Japanese Aviation Law provided for an antitrust exemption for agreements with any IATA carrier, on a non-specific basis (even though the fuel surcharge was not determined within IATA). The filings for formal antitrust exemption became more specific in mid-2006, requiring that the carrier confirm that it had actually conducted all consultations with other Designated National Airlines as required by the ASAs with their respective governments. (These consultations also had an effect on the surcharge accepted by MLIT for the United States, because MLIT required surcharges to be filed by distance group, as to which travel between Japan and North America and Europe were included in the same group. Hence the fuel surcharges filed and accepted in the United States, for travel from the United States to Japan, were subject to mandated consultations by Japan's Designated National Airlines with several other designated national airlines, with respect to which these surcharges received formal antitrust immunity in Japan under Article 110.)

A study group commissioned by the JFTC expressed concern that, as of late 2007, Japan's formal antitrust exemptions for carrier agreements under Article 110 of the Aviation Law in international aviation remained broad in scope, whereas other major jurisdictions had withdrawn many such exemptions. According to the report of the Study Group on Regulations and Competition Policy (the JFTC Report), the exemption from the application of the Antimonopoly Law of aviation agreements extends to IATA Accords, Carrier Fare Accords (under ASAs), Code Share Accords, Mileage Accords, and Pool Accords, whereas none of these remains exempt in the EU; in the United States, IATA Accords, Code Share Accords and Alliance Accords are only partially exempted.<sup>3</sup>

### 3. Administrative Guidance in Aviation Industry

Administrative guidance is a widely used method for carrying out governmental policies.<sup>4</sup> Although administrative guidance is not as common as (and as powerful as) it was in earlier times (1960's, 1970's and 1980's), still it is a commonly used administrative technique of the Japanese Government. The Administrative Procedures Law<sup>5</sup> defines administrative guidance as follows:

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<sup>3</sup> The JFTC Report: Actual Conditions of the International Aviation Market and Issues Related to Competitive Policies – Focus on the existence of antitrust exemption systems related to international aviation agreements – November 29, 2007, Study Group on Regulations and Competition Policy, pp. 37-38.

<sup>4</sup> For literature on administrative guidance in Japan, see Matsushita: International Trade and Competition Law in Japan (Oxford University Press, 1993), p. 59 *et seq.*

<sup>5</sup> Gyosei Tetsuzuki Ho, Law 88, 1993, as amended.



“Administrative guidance is advice, recommendation, or any other act of administrative agencies to a particular entity for the purpose of accomplishing certain administrative objectives within the scope of duties or matters in charge of the agency exercising it” (Article 2:6). Once asked to give a definition of administrative guidance in the National Diet, the Director General of the Cabinet Legislation Bureau gave the following definition:

“[Administrative guidance] is not legal compulsion restricting the rights of individuals and imposing obligations on citizens. It is a request or guidance on the part of the government within the limit of the task and administrative responsibility of each agency as provided for in the establishment laws, asking for a specific action or inaction for the purpose of achieving some administrative objective through cooperation on the part of the parties who are the object of the administration”.<sup>6</sup>

Although this definition is abstract and susceptible to different interpretations, several features stand out. (1) Compliance is not a legal obligation. (2) It is a *de facto* rather than a *de jure* directive issued by the government. (3) It should be distinguished from the personal conduct of governmental officials issuing it. (4) It is a form of government regulation which imposes rules of conduct on enterprises. (5) Often, but not always, administrative guidance represents a consensus of the industry on which it is imposed. (6) It is sometime used in preference to invoking a law, in a situation when the law could have been imposed. (7) Combined with other policy and legal instruments, sometime administrative guidance has the *de facto* power of compulsion. (8) Administrative guidance is issued within the authority of the Establishment Law and thus pertains to subject matter over which the minister invoking it has authority. Thus, administrative guidance represents powerful pressure, exerted by an administrative agency, to coerce, *de facto*, an individual or an enterprise to act (or to refrain from acting) in ways directed by the agency.

Administrative guidance can be classified into (1) promotional administrative guidance, (2) regulatory administrative guidance, and (3) adjudicatory administrative guidance. Regulatory administrative guidance is the point of interest here.

Regulatory administrative guidance is often used by the government to carry out specific policy objectives. Although there are many examples of such regulatory administrative guidance, one example is given here. In the Oil Crisis of 1973, the Cabinet decided to establish a price-reporting system in which each ministry would issue directives (guidance) to enterprises producing products in their sectors, requiring them to report when they intended to raise prices. The ministries then pressured the enterprises to stop raising prices, or to reduce the level of price rises. This was done without invoking any specific provision of law.

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<sup>6</sup> Reproduced at p. 61 of Matsushita, *supra*, note 5.

However, there was a wide-spread consensus among industries and, therefore, price hikes were effectively arrested. There are similar instances in which the government intervened in activities of industries by way of administrative guidance, and *de facto* controlled them.<sup>7</sup>

Formally, submission to administrative guidance may be considered "voluntary" because a refusal to follow it does not, *per se*, incur legal liability. However, when exercised in combination with other legal or non legal means, administrative guidance can be equally effective as formal compulsion. For this reason, to describe administrative guidance, the Japanese Government uses the term "directive" or "direct" instead of "guidance," "suggestion," "recommendation," or "advice." This circumstance is well illustrated by the MITI Statement that was issued in relation to a U.S. antitrust case, *In re Japanese Elec. Prod. Antitrust Litigation*,<sup>8</sup> in which Japanese television companies were claimed by a U.S. plaintiff to have engaged in domestic and export cartels in Japan, and thereby to have attempted to damage predatorily the plaintiff in the U.S. market.

I acted as an expert witness for and adviser to the Defendants Council, which was established by the Japanese defendant companies as to U.S. legal issues. In this capacity, I had occasion to hear from company officials how the MITI had pressured the companies to engage in an export cartel. For example, the MITI had powers to finance basic R&D and to cause financial institutions such as the Export & Import Bank to issue loans to exporters or to suspend them. In those days, such governmental financial assistance was essential for the development of the electronics industry in Japan. Such loans and assistance were withdrawn by MITI's directive if MITI administrative guidance was not complied with. In this sense, MITI administrative guidance was a *de facto* compulsion.

The MITI issued a statement that the export cartel in question was "directed" by the MITI and, therefore, should be regarded as a government compulsion. This statement was sent to the State Department by the Japanese Ambassador to the United States and then was transmitted to the U.S. District Court for the Eastern District of Pennsylvania. The MITI stated:

"Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy....Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the

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<sup>7</sup> See Matsushita, *supra*, note 4, pp. 62-63.

<sup>8</sup> *In re Japanese Elec. Prod. Antitrust Litigation*, 388 F. Supp. 565 (J.P.M.D.L., 1975).

Export and Import Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction.”<sup>9</sup>

When the U.S. Senate Judiciary Committee asked the Assistant Attorney General why the Justice Department had not initiated an action against the Japanese companies that were named defendants in the above mentioned antitrust case, he referred to this Japanese diplomatic note and replied in a letter sent to the Committee:

“[It] is clear from a Japanese diplomatic note dated April 25, 1975 that the export agreement among Japanese firms was fully authorized by the Japanese Ministry of Trade and Industry, and it is claimed in that letter that the Japanese Ministry *directed* the firms to enter into and comply with such an arrangement. If the conduct were directed by the Japanese Government in a legitimate exercise of its power to control export leaving Japan, our courts would be highly likely to uphold the arrangement against antitrust challenge on the grounds of a “foreign compulsion” or “Act of State” principle.”<sup>10</sup>

Similarly, in the Auto Case, in which the U.S. Government requested the Japanese Government to engage in “voluntary export restraint” of automobiles to the United States, the MITI “directed” Japanese automakers to limit the number of cars to be exported to the United States, and stated that there would be a legal compulsion if the directive were not honored. The Japanese Ambassador to the United States asked the U.S. Attorney General his view whether such an export control scheme would violate U.S. antitrust laws.<sup>11</sup> The U.S. Attorney General, William French Smith, replied in his letter to Ambassador Okawara:

“...[W]e believe that the Japanese automobile companies’ compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers. The Department

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<sup>9</sup> Diplomatic note from the Government of Japan to the State Department (April 25, 1975). The entire text of this statement is reproduced in Matsushita and Repeta, “The Restricting the Supply of Japanese Automobiles: Sovereign Compulsion or Sovereign Collusion?”, *Case Western Reserve Journal of International Law*, Vol. 14, No. 1 (Winter 1982), pp. 47-77, at 74-77. For an analysis of this letter, see Matsushita, “Export Control and Export Cartels in Japan”, *Harvard International Law Journal*, Vol. 20, 1979, pp. 101-125, at 122-123.

<sup>10</sup> Letter from Assistant Attorney General Donald I. Baker to Senator Edward M. Kennedy (D. Mass) (Feb. 16, 1977), partially reprinted in 1977 *Trade Regulation Report* (CCH), No. 274, at 15-16.

<sup>11</sup> Letter of Ambassador Okawara to U.S. Attorney General is reproduced at pp. 78-79 of Matsushita and Repeta, *supra.*, note 10.

of Justice is of the view that implementation of such an export restraint by the Government of Japan, including the division among the companies by MITI of the maximum exportable number of units, and the compliance with program by Japanese automobile companies, would not give rise to violations of United States antitrust laws. We believe that American courts interpreting the antitrust laws in such a situation would likely so hold.”<sup>12</sup>

In the Chemical Fiber Case, the MITI directed executives of a trade association composed of chemical fiber companies to make a plan to allocate the quantity of production of chemical fiber for each chemical company. The MITI pressured the trade association to engage in this production cartel in order to deal with a depression after the Korean War. The executives of the trade association complied with this directive, made an allocation plan and put it into practice. The JFTC intervened and challenged this as an illegal cartel. In the JFTC hearing, the executives raised a defense that their conduct was compelled by the MITI. The JFTC rejected this claim but made the following statement:

“It is recognized that, under the circumstances of this case, the Trade Association had no choice but to resort to this unlawful conduct and the executives who were faced with the guidance of the Ministry in charge indeed deserve sympathy. However, to excuse this conduct would mean the application of the Antimonopoly Law would be subject to intention of agencies without any authority to interpret the Antimonopoly Law and this can not be accepted.”<sup>13</sup> (emphasis supplied)

Similarly, in the Soy Sauce Association Case, the Association was directed by the Price Administration Agency of the Japanese Government to take measures to stifle a price hike, and to impose a ceiling of maximum prices charged by soy sauce producers. The JFTC challenged this as a price cartel and the Association raised a defense that this conduct was mandated by the Government. The JFTC rejected this defense but stated as follows:

“Whether there was a guidance by administrative agencies does not reduce the liability of enterprises in respect to administrative measures that the JFTC takes in order to remedy the illegality although this may be an extenuating factor to be taken into account when considering whether the respondent is held as criminally liable.”<sup>14</sup> (emphasis supplied)

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<sup>12</sup> The entire text of the letter of Attorney General is reproduced at pp. 80-81 of Matsushita and Repeta, *supra.*, note 10.

<sup>13</sup> In re Chemical Fiber Association, *Shinketsushu* (FTC Decisions Reporter), Vol. 5, p. 17 (1953).

<sup>14</sup> In re Noda Soy Sauce Company, *Shinketsushu*, Vol. 4, p. 1 (1952).

In both of the above decisions, the JFTC recognized in *dicta* that a pressure or *de facto* compulsion of the government could constitute an exoneration or extenuation *from criminal liability* of persons faced with formidable governmental pressures. No criminal penalties were imposed and only prospective restraining orders were implemented. The JFTC has the power to recommend a violating person for criminal prosecution to the Prosecutor General. If a conduct which is in violation of a provision of the Antimonopoly Law is *de facto* coerced by governmental pressures, the JFTC would never recommend the perpetrator for criminal prosecution. In this sense, a person who committed a violation in compliance with governmental directives would be treated more leniently than a person who committed a violation without such a directive.

In the Oil Cartel (Price Fixing) Case, the MITI prescribed the price level of petroleum products in the face of price hikes caused by the Oil Crisis in early 1970's. The MITI pressured petroleum companies to refrain from raising the price of petroleum products above the level indicated by the MITI. Petroleum companies discussed among themselves a desirable level of price and jointly requested the MITI to set up a maximum at the level requested by the companies. This joint request was challenged by the Public Prosecutor's Office as an illegal cartel. However, the Supreme Court excused the companies for the reason that the pressures of the MITI were so strong and, in order to remain profitable in the market, the companies had no choice but to resort to this joint discussion and request. The Supreme Court recognized the difficulty that the companies were confronted with, and exonerated this conduct from legal liability under Japan's Antimonopoly Law.<sup>15</sup>

With regard to the role of administrative guidance in air transportation, the situation is comparable to that in any of the other industries above mentioned. In the aviation area, the Ministry in charge is the MLIT. Under the authority given to the MLIT by the Aviation Law, the MLIT has the power to license business, allocate take off and landing slots, and approve or disapprove operation schedules and related matters. As touched upon earlier, the MLIT has the power to intervene in and regulate international tariffs if the MLIT judges that such tariffs are inappropriate. If the MLIT refuses to allow tariff changes, for example, an airline will be unable to respond to changes in market conditions, including recovery of increased costs. This could impose a significant financial penalty, just like a formal fine.

Professor Sakakibara discusses in his report ("the Sakakibara Report")<sup>16</sup> details of administrative guidance by the MLIT in the aviation industry. He states

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<sup>15</sup> Decision of the Supreme Court, February 24, 1984, *Keishu* (Supreme Court Criminal Cases Reporter), Vol. 38, No. 4, p. 1287 *et seq.*

<sup>16</sup> The Sakakibara Report (Commercial Airlines and Civil Aeronautics Administration in Japan). All references are to the original report in Japanese.

that the MLIT “directed” tariff schedules, including discount rates.<sup>17</sup> The MLIT introduced a tariff band system in 1996 whereby the MLIT approved a band or range within which tariffs were to be determined by airlines. The MLIT predetermined the standard tariff rates and indicated the margin of discount that airlines were to observe. With respect to international tariffs, the practice was that JAL proposed to the IATA changes of tariffs in accordance with the directives of the MLIT. Once IATA approved the tariff change, it was reported to the MLIT and other Aeronautical Authorities. Although nominally proposed to IATA by Japan’s Designated National Airlines, it was clear that such proposals were as directed by the MLIT.

Professor Sakakibara points out MLIT’s informal direction was made possible by the power of the MLIT in regard to, *inter alia*, the allocation of takeoff and landing slots, and license on new entry and withdrawal. The allocation of slots has been regarded as part of the governmental power under Japan’s ASAs and national law. By using this power to allocate or withdraw slots, the MLIT could wield tremendous pressures on airlines to comply with ministry direction. Airlines could not risk the consequences of failing to comply, even though such consequences were not a formal legal punishment for failure to follow administrative guidance.

The above described situation with regard to administrative guidance in the international aviation business is similar to the situations in which administrative guidance operated as governmental compulsion in other areas such as international trade. It should be noted here that the JFTC and the Antimonopoly Law play very little part, if any, in regulating tariffs in international aviation. Even where there is no formal antitrust immunity, the JFTC has not attempted to intervene as to tariffs set within ranges approved by MLIT formally or directed informally. In my judgment, based on the cases discussed above and my decades of experience in Japan’s antitrust law, the JFTC would not have a sound basis for such intervention because the conduct of the Designated National Airlines has been so comprehensively regulated by the MLIT. Accordingly, an agreement or information exchange pertaining to a carrier fare that is within upper and lower zone limits as declared by the MLIT in my view would not be actionable by the JFTC under the Anti-Monopoly Law, because MLIT, in setting such zones, was exercising its authority as to outcomes considered, by the Minister, to be reasonable and acceptable under Japan’s legal framework for aviation. In this respect, it may be noted that since Japan’s current regime for international aviation operations began in 1952, the JFTC has never brought an enforcement action against private carriers flying internationally to or from Japan.

#### 4. Comity Considerations in the U.S./Japan Antitrust Agreement

Under principles of international comity, national law enforcement authorities have considered the interests of other nations where those interests

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<sup>17</sup> The Sakakibara Report, pp. 4-7.

would be substantially affected by an action taken. Comity is more a matter of policy than a jurisdictional requirement. It is, however, recognized as a matter of international law. These principles assume that due respect will be paid to the interests of other sovereign nations. This consideration has prompted national law enforcement agencies to refrain from bringing legal actions where to do so would be an intrusion.

One such sensitive circumstance, as illustrated in the cases discussed above, is the predicament of enterprises and individuals caught between the demands of sectoral ministries and the expectations of enforcement agencies. By its nature, administrative guidance from government industrial and export ministries may seek to promote the growth and stability of the enterprises subject to their jurisdiction. The Japanese competition agency, the JFTC, may take a different view of such situations and seek to promote competition in all sectors, even those subject to administrative guidance promoting or compelling collaboration among enterprises. Japanese law recognizes that enterprises caught in the middle of such jurisdictional battles deserve sympathetic consideration for their plight. Indeed, the JFTC, itself, recognizes that in such a situation, *criminal* sanction is not warranted, even if the presence of administrative guidance does not totally excuse a violation of the Antimonopoly Law. Note also that the JFTC has not enforced the Japanese Anti-Monopoly Law, criminally, as to conduct in international aviation, the U.S. government has exercised discretion, based on comity principles, when made aware of such circumstances.

In commerce between the U.S. and Japan. This can be seen in the Tanner Crab Case, an agreement entered into among Japanese trading companies challenged by the U.S. Justice Department. When this case arose, I was asked by one of the trading companies which had been made a target of a U.S. grand jury investigation to advise it on the Japanese and U.S. antitrust law issues involved. My affidavit was transmitted from the trading company to the U.S. Justice Department. Through this experience, I learned how the Japanese government directed the importers to establish a trade association in which a close exchange of price information took place.

Before this case, there had been speculative purchases, by Japanese trading companies, of U.S. marine products. As a result of this speculation, some companies incurred huge financial losses. The Fishery Agency (part of the Ministry of Agriculture, Forestry and Fishery) intervened to prevent such excessive speculations of trading companies, and directed them to establish an association to stabilize trade terms. The trading companies which were made defendants in this case exchanged price information to stabilize the import prices of tanner crab. In this way, the policy of the Fishery Agency was to stabilize price, prevent speculation, and avoid "excessive competition." This policy was implemented.

Initially the U.S. Justice Department opened a criminal investigation. However, later after receiving a Note Verbale from the Japanese government, delivered to the U.S. Department of State, the U.S. Justice Department decided not to indict criminally and brought a civil complaint instead. The Japanese Government (the Foreign Ministry, The Fisheries Agency, the MITI and the JFTC) approached the Justice Department and pleaded that the association in question was a creation of the guidance of the Japanese Government, and that to hold activities of this association as a crime would be offensive to Japan's governmental policy. The case was settled by a consent judgment between the Justice Department and the defendants.<sup>18</sup> This case is an example where the U.S. Justice Department took into consideration when deciding the nature of action to be taken with respect to the conduct of foreign entities, when such conduct was mandated by the foreign government. Switching from a criminal prosecution to a civil injunctive suit is an example of exercising international comity.

Among international treaties entered into between the United States and Japan, two are particularly important, i.e., the Friendship Commerce and Navigation Treaty between the United States and Japan (The FCN Treaty) and The Agreement between the Government of Japan and the Government of the United States Concerning Cooperation on Anticompetitive Activities (U.S./Japan Antitrust Agreement). Each of them observes the principle of international comity to be applied to international transactions between the two countries.

Article II of the FCN Treaty states that "Nationals and companies of either Party shall be free from unlawful molestations of every kind." Article IV states,

"Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights."

Article 6.1 of the U.S./Japan Antitrust Agreement states:

"Each Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of penalties or relief sought in each case."

Article 6.3 states that either Party considers that the enforcement activities by the Party may adversely affect the important interests of the other Party and, when considering this, take into account certain factors. One such

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<sup>18</sup> United States v. C. Itoh & Co. et al, 1986 Trade Cases Para 67,004 (U.S.D.C., WD. Washington, Oct. 20, 1982).



factor is listed in Article 6.3, Paragraph (e), which states that each Party shall consider “the degree of conflict or consistency between the enforcement activities by a Party and the laws of the other country, or the policies or important interests of the other Party ....”

There would be a conflict between the Aviation Law and its enforcement activities in Japan and U.S. antitrust laws if agreements authorized by the Aviation Law and directed by administrative guidance of MLIT in Japan, or if industry negotiations related to or supported by the MLIT, are held unlawful under U.S. antitrust laws, especially if criminal liability is attached. It is noted by Professor Goodman that even where the guidance itself may be considered “voluntary,” the obligation to enter into all of the negotiations as required by the ministry is essentially compulsory, even if the guidance itself can later be rejected.<sup>19</sup> It is to be noted also that agreements duly authorized by the MLIT are exempted from the application of the Antimonopoly Law in Japan and removed from the scope of competition laws.

This analysis suggests that, *inter alia*, under the U.S./Japan Antitrust Agreement and the principle of comity enshrined therein, an enforcement agency in the United States should take into account the above legal situations in Japan when considering whether to bring any action related to conduct directed in Japan under authority duly granted under Japanese law and implemented, formally or informally, under Japan’s air transportation policy.

It is to be noted also that, when dealing with a subject matter that cuts across the boundaries of more than one nation, there would be an overlap and possible conflict of jurisdictions. In Japan, conflict of law issues are handled under the General Law on the Application of Law.<sup>20</sup> One of the principles incorporated in this law is that the applicable law should be the law of the jurisdiction to which the subject matter of the case in question is most closely related in a case where there is a possibility that several laws of different countries may apply to it.<sup>21</sup> Furthermore, Article 42 of the Law states that an application of a foreign law is rejected if such application creates a conflict with the public order in Japan. The public order is incorporated in laws and regulations in Japan. The Aviation Law and the transportation policy incorporated in this law is a public policy/public order in Japan. Therefore, in Japan, only this law and policy is exclusively applied excluding application of any foreign law that is contrary to them.

The jurisdictional rule of reason is recognized by U.S. courts in *Timberlane and Mannington Mills*. According to this rule as to when jurisdiction should be exercised, Japanese regulatory principles in international aviation should be most

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<sup>19</sup> Carl F. Goodman, The Rule of Law In Japan, A Comparative Analysis (Walters Kluwer, 2008), p. 484.

<sup>20</sup> Ho no Tekiyo nikansuru Tsusoku Ho (Law 78, 2006).

<sup>21</sup> Article 8:1 of this law.

appropriately taken into account by the U.S. authority in deciding whether to enforce a criminal measure against conduct that is heavily regulated under Japan's legislation and international agreements on air services. In making these decisions, it is important to bear in mind that in aviation businesses, the government is authorized to intervene into and regulate business activities, and approve agreements among enterprises on tariffs.

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Mitsuo Matsushita